

No. 9397

United States
Circuit Court of Appeals

For the Ninth Circuit. 9

UNITED CIGAR WHELAN STORES CORPO-
RATION, a corporation, and EDGAR
DEHNE,

Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

FILED

JAN 30 1940

PAUL P. O'BRIEN,



United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED CIGAR WHELAN STORES CORPO-
RATION, a corporation, and EDGAR
DEHNE,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

THE UNIVERSITY OF CHICAGO
PHYSICS DEPARTMENT

REPORT OF THE COMMITTEE ON THE
PROGRESS OF THE DEPARTMENT

FOR THE YEAR 1911-1912

PRESENTED TO THE BOARD OF TRUSTEES
AT THE ANNUAL MEETING, 1912

BY THE COMMITTEE ON THE
PROGRESS OF THE DEPARTMENT

CHICAGO, ILLINOIS, 1912

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana

No. 3443

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

UNITED CIGAR WHELAN STORES COR-
PORATION, a corporation, and EDGAR
DEHNE,

Defendants.

Be It Remembered that on June 17, 1939, an
Indictment was presented and filed herein, being
in the words and figures following, to-wit: [2]

In the District Court of the United States in and
for the District of Montana, Butte Division

No. 3443

UNITED STATES OF AMERICA,
Plaintiff,

v.

UNITED CIGAR WHELAN STORES COR-
PORATION, a Corporation, and EDGAR
DEHNE,

Defendants.

INDICTMENT

In the June, 1939 term of the above-entitled Court,
held at the city of Helena, in the state and district

of Montana, the grand jurors of the United States, duly impaneled, sworn and charged to inquire, within and for the district of Montana, and true presentment make of all public offenses against the laws of the United States, within said State and District, upon their oaths and affirmations *to find, charge and present*:

COUNT ONE

T. D. 4750—Carrying on Business of Retail Liquor Dealer) (26-1397(a)(1))

That beginning on or about the 9th day of March, 1939, and continuing until on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, In the county of Silver Bow, in the State and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, [3] other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously carry on the business of a retail liquor dealer and willfully fail to pay the special tax imposed by law on such dealers, in that said defendants, and each of them, then and there, in violation of a regulation issued under Title III of the National Prohibition Act, as amended, pertaining to and forbidding the sale of articles in the manufacture of which

denatured alcohol is used, under circumstances from which said defendants might reasonably deduce that it was the intention of the purchaser to procure the same for beverage purposes, did, on or about the 9th day of March, 1939, at the place aforesaid, sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson, and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less of such article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 9th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th day of March, 1939, at the place aforesaid, did sell one pint, more or less of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 10th [4] day of March, 1939, at the

place aforesaid, did sell one pint, more or less, of such an article, to-wit: Weko, to a certain person, to-wit: to Julius N. Johnson; and on or about the 15th day of April, 1939, at the place aforesaid, did sell one pint, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson; and on or about the 15th day of April, 1939, at the place aforesaid, did sell four pints, more or less, of such an article, to-wit: Wecol, to a certain person, to-wit: to Julius N. Johnson, under circumstances from which they, the said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and said defendants, and each of them, did willfully fail to pay a special tax as a retail dealer in liquors; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[5]

COUNT TWO

(T. D.—4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present;

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of

Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the Manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [6]

COUNT THREE

(T. D.—4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present;

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [7]

COUNT FOUR

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in

the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [8]

COUNT FIVE

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Store Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [9]

COUNT SIX

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [10]

COUNT SEVEN

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the

county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [11]

COUNT EIGHT

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at

34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America [12]

COUNT NINE

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Weko, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [13]

COUNT TEN

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, one pint, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [14]

COUNT ELEVEN

(T. D. 4750—Sale for Beverage Purposes)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly sell to a certain person, to-wit: to one Julius N. Johnson, four pints, more or less, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation pertaining thereto (Article 146-A, Regulation No. 3, as amended); contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [15]

COUNT TWELVE

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [16]

COUNT THIRTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the

article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[17]

COUNT FOURTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for

use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America. [18]

COUNT FIFTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 9th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, know-

ingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[19]

COUNT SIXTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan

Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

[20]

COUNT SEVENTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [21]

COUNT EIGHTEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein

and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [22]

COUNT NINETEEN

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 10th day of March, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Weko, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for

beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [23]

COUNT TWENTY

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown,

did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [24]

COUNT TWENTY-ONE

(T. D. 4750—Sale in Unstamped Containers)

(26-1152a)

(26-1152g)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district

of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated, is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully, knowingly and feloniously sell Wecol, an article in the manufacture of which denatured alcohol had been used, under circumstances from which said defendants, and each of them, might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation issued under Title III of the National Prohibition Act, pertaining to and forbidding the sale of such article under such circumstances, in immediate containers on which there was affixed no stamp denoting the quantity of the article contained therein and evidencing payment of all Internal Revenue taxes imposed on such article; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [25]

COUNT TWENTY-TWO

(Possession with Intent to Violate Law)

(27-157)

(27-85)

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That on or about the 15th day of April, 1939, at 34 North Main Street, in the city of Butte, in the county of Silver Bow, in the state and district of Montana, and within the jurisdiction of this Court, the above-named defendants, United Cigar Whelan Stores Corporation, a Delaware corporation, a more particular description of said corporation being to the grand jurors aforesaid unknown, and Edgar Dehne, whose true name, other than as herein stated is to the grand jurors aforesaid unknown, did, then and there, willfully, wrongfully, unlawfully and knowingly possess a quantity, to the grand jurors aforesaid unknown, of an article, to-wit: Wecol, in the manufacture of which denatured alcohol was used, with the intention to use it in violation of a regulation issued under Title III of the National Prohibition Act pertaining to and forbidding the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes, to-wit: to sell it under

circumstances from which said defendants might reasonably deduce that it was the intention of the purchaser to procure it for beverage purposes; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN B. TANSIL

Attorney of the United
States, in and for the
District of Montana. [26]

[Indictment Endorsed]: No. 3443. (Title of Court and Cause.) Indictment. A true bill, R. B. Ruthardsen, Foreman. Filed in open Court this 17th day of June, A. D. 1939. C. R. Garlow, Clerk. Bail, \$1000.00. Warrant to issue. Summons to issue. [27]

Thereafter, on October 18, 1939, the defendants were arraigned and entered their pleas of not guilty, the record thereof, as shown by the journal of the court, being in the words and figures following, to-wit: [28]

[Title of District Court and Cause.]

The defendants were duly called for arraignment and plea this day, the defendant corporation appearing by its attorney, Mr. Robert D. Corette, and the defendant Edgar Dehne being personally pres-

ent. Mr. John B. Tansil, the District Attorney, was present and appeared for the United States.

Thereupon the defendants were arraigned and answered that their true names are, respectively, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne.

Thereupon, on motion of Mr. Robert D. Corette, court ordered that his name be entered as attorney for both defendants herein.

Thereupon the indictment was read to the defendants, whereupon defendants waived the time to plead and each of the said defendants entered a plea of not guilty.

The setting of the case for trial was passed at this time.

Entered in open Court at Butte, Montana, October 18, 1939.

C. R. GARLOW,
Clerk. [29]

Thereafter, on November 14, 1939, the following record of trial was entered in the minutes of the court, to-wit: [30]

[Title of District Court and Cause.]

This cause came on regularly for trial this day, the defendant corporation was present by its attorneys Mr. Robert D. Corette and Mr. William A. Davenport, and the defendant Edgar Dehne was personally present and also represented by his

counsel Mr. Robert D. Corette and Mr. William A. Davenport. Mr. R. Lewis Brown and Mr. W. D. Murray, Assistants to the District Attorney, were present and appeared for the United States.

Thereupon the impanelling of a jury was proceeded with, during the course of which Mr. John H. Crocker was called as a juror; and it appearing that said John H. Crocker is now too ill to sit as a juror in the trial of this case, by consent of all parties he was excused from attendance at this time and by the court excused until 10 A. M. tomorrow.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the cause, viz:

W. F. Cassidy, C. C. Irwin, Wm. Buhl, Frank Arthur, F. E. Poe, F. E. Tyler, Richard Newgard, Melvin Nance, George A. Ames, Ralph Ahern, E. H. Young and A. C. Hammond.

Thereupon Dennis E. Denneen was called and sworn as a witness for the United States.

Thereupon the defendants objected to the introduction of any evidence herein and moved the court for a dismissal of the indictment upon the ground and for the reason that said indictment does not state facts sufficient to constitute any offense or offenses against the laws of the United States and upon other grounds stated by counsel and read into the record. [31]

Thereupon, after hearing the arguments of counsel, said objection and motion were by the court

overruled and denied as to all twenty-two counts of the indictment, on all grounds upon which said objection and motion were based, except that part of the objection and motion made concerning repeal of certain statutes, which objection and motion to that effect went only to count numbered one and counts numbered eleven to twenty-one inclusive, and as to those counts, on that ground, the objection and motion were overruled and denied pro forma. To this ruling of the court the defendants then and there excepted and exception duly noted.

Thereupon Thomas F. Murphy and Julius N. Johnson were sworn and examined as witnesses for the United States and a certain document marked Plaintiff's exhibit No. 1 was offered and received in evidence.

Thereupon John H. Cosgriff, Jack Dougherty, Roy H. Beadle, S. O. Clinton, Robert E. Dussault, Val Derana and Hugo Ringstrom were sworn and examined as witnesses for the United States, plaintiff's exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14, being bottles containing alcohol, and defendants' exhibits No. 16 and 17, being certain documents, were offered and received in evidence. Plaintiff's exhibits Nos. 11, 15, 18, 19, 20, 21 and 22, being bottles containing alcohol, were marked but not offered in evidence at this time.

Thereupon further trial of the cause was ordered continued until 10 A. M. tomorrow and the jury excused until that time.

Entered in open court at Butte, Montana, November 14, 1939.

C. R. GARLOW,
Clerk. [32]

Thereafter, on November 15, 1939, the following

RECORD OF TRIAL

was entered in the minutes of the court, to-wit:
[33]

[Title of District Court and Cause.]

Defendants and respective counsel, with the jury, present as before and trial of cause resumed.

Thereupon the United States rested.

Thereupon defendants moved the court to direct the jury to return a verdict of not guilty as to each defendant and to dismiss the indictment herein, for lack of proof and on other grounds stated by counsel and read into the record, which motion was by the court denied and to which ruling the defendants then and there excepted, and exception duly noted. Thereupon court ordered that the defendants' motion to dismiss the indictment, made on yesterday, be now, in respect to count number one and counts number eleven to twenty-one inclusive, definitely and finally overruled. To this ruling of the court the defendants then and there excepted, and exception duly noted.

Thereupon Edgar Dehne, Walfred Maenpa, Damon Vigeant, Charles A. Davies, Frank Sullivan and Cyril Varcoe were sworn and examined as wit-

nesses for defendants, and a certain document, marked plaintiff's exhibit No. 23, was offered and received in evidence; whereupon the defendants rested and the evidence closed.

Thereupon the defendants renewed their motion for a directed verdict, made at the close of plaintiff's case, which motion was by the court denied and exception of defendants noted.

Thereupon, after the arguments of counsel and the instructions of the court, the jury retired in charge of sworn bailiffs to consider of its verdict, the Marshal being ordered to furnish meals and any necessary lodging to the jurors and two bailiffs.

Thereafter, at 10.20 P. M., the jury returned into Court with its verdict, the defendants and respective counsel being [34] present as before.

Thereupon the verdict of the jury was duly received by the court, read and filed, and by the jury acknowledged to be its true verdict as follows, to wit:

[Title of Court and Cause.]

“We, the jury in the above entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein.

E. H. YOUNG,
Foreman.”

On motion of the defendants, the jury was polled and each juror answered that the verdict as read is his true verdict.

Thereupon court ordered that the time for sentence be continued until Monday, November 20th, 1939, at 10 A. M., and that defendant Dehne be released on the bond heretofore given, which bond shall remain in force and effect.

Entered in open court at Butte, Montana, November 15, 1939.

C. R. GARLOW,
Clerk. [35]

Thereafter, on November 20, 1939, defendant Edgar Dehne filed his Notice of Appeal herein, in the words and figures following, to-wit: [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Edgar Dehne, one of the above named defendants, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in favor of the plaintiff and against the defendant on November 15th, 1939, and from the judgment pronounced against the defendant on November 20th, 1939.

The name and address of appellant:

Edgar Dehne
119 West Copper Street
Butte, Montana

The name and address of appellant's attorneys:

Corette & Corette
Robert D. Corette and
Wm. A. Davenport,
619-621 Hennessy Building
Butte, Montana.

Offense: Violation of the Internal Revenue Laws of the United States relating to the carrying on of the business of a retail liquor dealer without having paid the taxes required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes and in unstamped containers and with possession thereof with intent to violate the law. [37]

The sections alleged to have been violated are as follows:

T. D. 4750

26 U. S. C. 1397

(a) (1) 27 U. S. C. 85

26 U. S. C. 1152a

26 U. S. C. 1152g

27 U. S. C. 157

27 U. S. C. 65

Date of judgment: November 20, 1939.

Brief description of judgment or sentence:

The indictment contains 22 counts. Edgar Dehne is fined \$100.00 on count 1 and given a thirty-day jail sentence under count 1 and fined \$1.00 for each count from count 2 to 22 inclusive.

Edgar Dehne is not confined to jail but is on bail.

I, the above named appellant, Edgar Dehne, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above named on the grounds set forth below:

1. That regulation T. D. 4750 is unconstitutional and void.

2. That counts numbered 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 were brought under laws, acts and regulations which had been repealed at the time of the alleged offense.

3. That the defendant, Edgar Dehne's motion objecting to the introduction of evidence and for the dismissal of the action should have been granted.

4. That the defendant, Edgar Dehne's motion for acquittal and dismissal of the action at the close of the plaintiff's case should have been granted.

5. That the defendant, Edgar Dehne's motion for a dismissal and acquittal at the termination of the introduction of all of the evidence in the case should have been granted.

6. That the defendant, Edgar Dehne, cannot be convicted under counts 1, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 or 22 for the reason that the evidence [38] does not support the counts of the indictment listed in this ground.

EDGAR DEHNE

Service of the above and foregoing Notice of Appeal acknowledged and a copy thereof received this 20th day of November, 1939.

W. D. MURRAY

Assistant United States Attorney

For the District of Montana

[Endorsed]: Filed November 20, 1939. [39]

Thereafter, on November 20, 1939, the defendant Edgar Dehne's Bail Bond on appeal, as approved, was duly filed herein, in the words and figures following, to-wit: [40]

[Title of District Court and Cause.]

BAIL BOND

Know all men by these presents:

That we, Edgar Dehne, as Principal, and National Surety Company, a corporation incorporated under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of \$1,000.00 to be paid to the United States of America to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 20th day of November, 1939. The condition of this obligation is such that:

Whereas, on the 17th day of June, 1939, an indictment was filed in the above entitled Court and cause against the above named defendants charging them jointly in twenty-two counts with violations of sections 26 U. S. C. 1397 (a) (1); 27 U. S. C. 85; 26-1152a; 26-1152-g; 27-157; 27-65; T. D. 4750; and

Whereas, the said defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, were found guilty of each and all offenses charged in said indictment by a jury in the

above entitled Court and cause, and on the 20th day of November, 1939, judgment and sentence was rendered and pronounced [41] by the above entitled Court by the Judge of said Court upon both named defendants. By the judgment the defendant, Edgar Dehne, was sentenced on count one of the indictment to imprisonment for the term of thirty days, and fined thereon the sum of \$100.00; that he was fined \$1.00 on each of the other counts, viz., two to twenty-two inclusive; and

Whereas, on the 20th day of November, 1939, said defendant, Edgar Dehne, filed in the above entitled Court and cause his notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit by which appeal it is sought to reverse the judgment and sentence imposed on him in the above entitled cause; a copy of such Notice of Appeal having been duly served upon the plaintiff, United States of America; and

Whereas, the said defendant, Edgar Dehne, on the 20th day of November, 1939, made application to be released on bail herein pending said appeal, and upon such application the above entitled Court by order duly given and made herein on the 20th day of November, 1939, ordered that defendant, Edgar Dehne, be admitted to bail pending his appeal upon furnishing a good and sufficient bond in the penal sum of \$1,000.00 as provided by law.

Now, therefore, the condition of this obligation is such that if the said defendant, Edgar Dehne shall, in the event that said appeal is withdrawn or

dismissed, or in the event said judgment is affirmed, thereupon surrender himself in execution of said judgment and hold himself at all times amenable to and abide by the orders of said United States Circuit Court of Appeals for the Ninth Circuit, as well as all orders of the above entitled Court, and if said defendant fails to prosecute his appeal *or affect* or make his plea good, shall pay the fine imposed upon him, together with costs of appeal, and shall surrender himself to the custody of this Court if said judgment be affirmed or said appeal withdrawn or dismissed, then this obligation to be null [42] and void, otherwise to remain in full force and effect.

EDGAR DEHNE

Principal

NATIONAL SURETY COMPANY,

a corporation

By PAUL HUDTLOFF

Attorney in fact

Surety

Countersigned at Butte, Montana Nov. 20, 1939.

PAUL HUDTLOFF

The foregoing Bond is approved this 20th day of November, 1939.

W. D. MURRAY

Assistant United States Attorney for
the District of Montana

The foregoing Bond is approved this 20th day of November, 1939.

JAMES H. BALDWIN

Judge

[Endorsed]: Filed November 20, 1939. [43]

Thereafter, on November 20, 1939, an

ORDER OF COURT RELEASING DEFENDANT EDGAR DEHNE FROM CUSTODY, AND ADMITTING HIM TO BAIL PENDING APPEAL,

was duly filed and entered herein, in the words and figures following, to-wit: [44]

[Title of District Court and Cause.]

On application of the defendant, Edgar Dehne, for admission to bail pending his appeal now being taken in the above entitled cause, it is ordered that the defendant, Edgar Dehne, be admitted to bail and released from custody pending his appeal and that he furnish a good and sufficient bond in the penal sum of \$1,000.00, as provided by law.

Dated this 20th day of November, 1939.

JAMES H. BALDWIN

Judge

[Endorsed]: Filed and entered November 20, 1939. [45]

Thereafter, on November 21, 1939, the defendant United Cigar Whelan Stores Corporation, a corporation, filed its Notice of Appeal herein, in the words and figures following, to-wit: [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United Cigar Whelan Stores Corporation, a corporation, one of the above named defendants, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in favor of the plaintiff and against the defendant on November 15th, 1939, and from the judgment pronounced against the defendant on November 20th, 1939.

The name and address of appellant:

United Cigar Whelan Stores Corporation,
a corporation,
54 North Main Street
Butte, Montana

The name and address of appellant's attorneys:

Corette & Corette
Robert D. Corette and
Wm. A. Davenport
619-621 Hennessy Building
Butte, Montana.

Offense: Violation of the Internal Revenue Laws of the United States relating to the carrying on of the business of a retail liquor dealer without having paid the taxes required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes and in unstamped con- [47] tainers and with possession thereof with intent to violate the law.

The sections alleged to have been violated are as follows:

T. D. 4750

26 U. S. C. 1397

(a) (1) 27 U. S. C. 85

26 U. S. C. 1152a

26 U. S. C. 1152g

27 U. S. C. 157

27 U. S. C. 65

Date of judgment: November 20th, 1939.

Brief description of judgment or sentence:

The indictment contains twenty-two counts. United Cigar Whelan Stores Corporation, a corporation, is fined \$2500.00 on the first count, and \$200.00 on each count from count two to twenty-one inclusive, and \$1,000.00 on count twenty-two.

The above named appellant, United Cigar Whelan Stores Corporation, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above named on the grounds set forth below:

1. That regulation T. D. 4750 is unconstitutional and void.

2. That counts numbered 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 were brought under laws, acts and regulations which had been repealed at the time of the alleged offense.

3. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation, objecting to the introduction of evidence and for the dismissal of the action should have been granted.

4. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation,

for acquittal and dismissal of the action at the close of the plaintiff's case should have been granted.

5. That the motion of the defendant, United Cigar Whelan Stores Corporation, a corporation, for a dismissal and acquittal at the termination of the introduction of all of the evidence in the case should have been granted. [48]

6. That each and all of the objections of the defendant, United Cigar Whelan Stores Corporation, a corporation, which were overruled by the Court, should have been sustained.

Dated November 21st, 1939.

UNITED CIGAR WHELAN
STORES CORPORATION,
a corporation,

By ROBERT D. CORETTE

One of its Attorneys.

Service of the above and foregoing Notice of Appeal acknowledged and copy thereof received this 21st day of November, 1939.

W. D. MURRAY

Assistant United States District Attorney

[Endorsed]: Filed November 21, 1939. [49]

Thereafter, on November 21, 1939, the defendant United Cigar Whelan Stores Corporation, a corporation, filed its bond guarantying payment of fines and penalties and cost bond on appeal, as approved, herein in the words and figures following, to-wit: [50]

[Title of District Court and Cause.]

BOND GUARANTYING PAYMENT OF FINES
AND PENALTIES AND COST BOND

Know All Men by these presents:

That we, United Cigar Whelan Stores Corporation, a corporation, as Principal, and National Surety Corporation, a corporation incorporated under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of Nine Thousand and no/100 Dollars to be paid to the United States of America to which payment well and truly to be made we bind ourselves, successors and assigns, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 21st day of November, 1939. The condition of this obligation is such that:

Whereas, on the 17th day of June, 1939, an indictment was filed in the above entitled Court and cause against the above named defendants charging them jointly with carrying on the business of a retail liquor dealer without having paid the tax required by law therefor and with the sale of certain articles containing denatured alcohol for beverage purposes, and in unstamped containers, and with possession thereof with intent to [51] violate the law, as more fully appears from the said indictment on file in the office of the Clerk, and contrary to the statutes of the United States, and in violation of the peace and dignity of the United States, in

twenty-two counts with violations of sections 26 U.S.C. 1397 (a) (1); 27 U.S.C. 85; 26 U.S.C. 1552a; 26 U.S.C. 1152g; 27 U.S.C. 157; 27 U.S.C. 65; T.D. 4750; and

Whereas, the said defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, were found guilty of each and all offenses charged in said indictment by a jury in the above entitled Court and cause, and on the 20th day of November, 1939, judgment and sentence were rendered and pronounced by the above entitled Court by the Judge of said Court upon both named defendants. By the judgment the defendant, United Cigar Whelan Stores Corporation, a corporation, was fined on count one of the indictment the sum of \$2,500.00; that it was penalized \$200.00 on each of counts two to twenty-one inclusive, and was penalized \$1,000.00 on count numbered twenty-two; that the fine and penalties against the United Cigar Whelan Stores Corporation, a corporation, imposed by the said judgment totaled the sum of \$7500.00; and

Whereas, on the 21st day of November, 1939, said defendant, United Cigar Whelan Stores Corporation, a corporation filed in the above entitled Court and cause its notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit by which appeal it is sought to reverse the judgment and fine imposed on it in the above entitled cause; a copy of such Notice of Ap-

peal having been duly served upon the plaintiff, United States of America.

Now, therefore, the condition of this obligation is such that if the said defendant, United Cigar Whelan Stores Corporation, a corporation, shall, in the event that said appeal is withdrawn or dismissed, or in the event said judgment is affirmed, thereupon hold itself at all times amenable to and abide by the [52] orders of said United States Circuit Court of Appeals for the Ninth Circuit as well as all orders of the above entitled Court, and if said defendant fails to prosecute its appeal or effect or make its plea good, it shall pay the fines and penalties imposed upon it, together with costs of appeal, then this obligation to be null and void, otherwise to remain in full force and effect.

UNITED CIGAR WHELAN
STORES CORPORATION,
a corporation,

By WM. A. DAVENPORT

One of its Attorneys,

Principal.

[Corp. Seal]

NATIONAL SURETY COR-
PORATION, a corporation,

By PAUL HUDTLOFF

Attorney-in-Fact,

Surety.

Countersigned at Butte, Montana, November 21,
1939.

PAUL HUDTLOFF.

The foregoing Bond is approved this 21st day of November, 1939.

R. LEWIS BROWN

Assistant United States Attorney for the District of Montana.

The foregoing Bond is approved this 21st day of November, 1939.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed November 21, 1939. [53]

Thereafter, on November 21, 1939, an Order of court staying execution on any and all proceedings to enforce the judgment entered against the defendant United Cigar Whelan Stores Corporation, a corporation, on November 20, 1939, during the pendency of its appeal, was filed and entered herein in the words and figures following, to-wit: [54]

[Title of District Court and Cause.]

ORDER

Whereas, the defendant, United Cigar Whelan Stores Corporation, a corporation, has filed with this Court a good and sufficient bond for the staying of the execution of judgment granted against it in the above entitled cause, which judgment was entered on November 20th, 1939.

Now, therefore, it is ordered and this does order that execution be stayed on any and all proceedings to enforce the judgment entered against the United Cigar Whelan Stores Corporation, a corporation, on November 20th, 1939, during the pendency of its appeal.

Dated this 21st day of November, 1939.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed and entered Nov. 21, 1939.

[55]

Thereafter, on December 19, 1939, an Order of Court directing the Clerk thereof to transmit to the United States Circuit Court of Appeals for the Ninth Circuit defendants' original Exhibits 16 and 17 and plaintiff's original Exhibit 23 with the record on appeal herein was filed and entered in the words and figures following, to-wit: [56]

[Title of District Court and Cause.]

ORDER

It is hereby ordered and this does order the clerk of the above entitled Court to forward with the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, defendants' original Exhibits 16 and 17 and plaintiff's original Exhibit 23,

said exhibits being for use by the Circuit Court at the time of hearing the appeal.

Dated this 19th day of December, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered December 19, 1939. [57]

Thereafter, on December 19, 1939, defendants' Praeipce for transcript of record was duly filed herein, in the words and figures following, to-wit:

[58]

[Title of District Court and Cause.]

PRAECIPE

To the Honorable Charles R. Garlow, Clerk of the
Above Entitled Court:

You are hereby requested to prepare and certify to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, a Transcript of the record in the above entitled cause for the purpose of appeal taken herein from the judgment of the above entitled Court, pronounced, made and entered on November 20th, 1939.

The defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, hereby designate and indicate the portions of the records, papers and files to be incorporated in said Transcript of Appeal as follows:

1. Indictment.
2. Plea of not guilty entered by both defendants.
3. Record of trial.
4. Record of trial and verdict.
5. Notice of appeal filed on behalf of Edgar Dehne.
6. Bail bond of Edgar Dehne in the amount of \$1,000.00.
7. Order admitting Edgar Dehne to bail.
8. Notice of appeal for United Cigar Whelan Stores Corporation, a corporation.
9. Bond of United Cigar Whelan Stores Corporation, a corporation, in the amount of \$9,000.00.
10. Order staying execution pending appeal.
11. Bill of exceptions settled and allowed by the Court.
12. Order to forward defendants' Exhibits 16 and 17 and plaintiff's Exhibit 23. [59]
13. Defendants' Exhibits 16 and 17, and plaintiff's Exhibit 23.
14. And this praecipe.

Dated this 19th day of December, 1939.

CORETTE & CORETTE
ROBERT D. CORETTE,
WM. A. DAVENPORT

Attorneys for Defendants,
United Cigar Whelan Stores
Corporation, a corporation,
and Edgar Dehne.

Service of the above and foregoing Praeceptum acknowledged and copy thereof received this 19th day of December, 1939.

R. LEWIS BROWN

Assistant United States Attorney.

[Endorsed]: Filed December 19, 1939. [60]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 60 pages, numbered consecutively from 1 to 60, inclusive, is a full, true, and correct transcript of the record and proceedings designated by the parties as the record on appeal in case No. 3443, United States of America, Plaintiff, v. United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, Defendants, as appears from the original files and records of said District Court in my custody as such Clerk.

I further certify that transmitted herewith are the original Bill of Exceptions and Assignment of Errors in said cause.

I further certify that the costs of said transcript amount to the sum of Fifteen and 95/100 Dollars, (\$15.95) and have been paid by the appellants.

Witness my hand and the seal of said District Court at Butte, Montana, this 26th day of December, 1939.

[Seal]

C. R. GARLOW,

Clerk as Aforesaid.

By HAROLD [?] ALLEN

Deputy Clerk. [61]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that this cause came on regularly for trial before the Honorable James H. Baldwin, Judge of the District Court of the United States, in and for the District of Montana, Butte Division, sitting with a jury, on Tuesday, November 14, 1939, R. Lewis Brown and W. D. Murray, appearing as attorneys for plaintiff, and R. D. Corette and William Davenport, appearing as attorneys for the defendants.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing had and taken thereon, and the evidence and testimony hereinafter set out, being all the evidence and testimony offered and introduced and

offered and rejected. The testimony and evidence hereinafter set out was and is all the testimony and evidence heard by the court, and was and is all the testimony and evidence offered by the parties to this cause and received by [62] the court and offered by the parties to this cause and rejected by the court, to-wit: [63]

D. E. DENEEN,

a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown

Q. Will you state your name, please?

A. Dennis E. Deneen.

Q. And your residence?

A. Helena, Montana.

Mr. Corette: If the court please defendants desire to make a motion at this time, and we would like the privilege of arguing the motion to the court.

(Jury excused from the court room.)

Mr. Corette: If the court please, comes now the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, and object to the introduction of any evidence and ask for a dismissal of the indictment upon the following grounds and for the following reasons: First, that the indictment does not state facts sufficient to constitute an offense or offenses against the laws of the

(Testimony of D. E. Deneen.)

United States; second, that the facts set forth in counts one to twenty-two, inclusive, of the indictment, do not state facts sufficient to constitute any offense against the laws of the United States; third, that counts number one, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one charge the defendants with offenses committed against the Revenue Laws of the United States between the dates of March 9, 1939 and April 15, 1939; that prior to that time, and on February 10, 1939, the Internal Revenue Code was re-enacted and the old Internal Revenue Code was repealed; that the sections under which the indictments are brought in these counts which I have specified were brought under the old law and which was repealed on [64] February 10, 1939; the acts set forth in the indictment having occurred in March and April of 1939, therefore, at the time of the indictment, and as to these specified counts, there was no law under which the indictment could be brought.

And as to for a further grounds, these defendants object to the introduction of any evidence and ask for a dismissal of the indictments upon the grounds and for the reasons that regulation 4970, upon which all of the counts numbered one to twenty-two, inclusive, and the entire indictment is based—that is Treasury Decision 4750—is in denial of due process of law, is unconstitutional and void.

(Testimony of D. E. Deneen.)

The Court: (After argument and remarks) On the ground of uncertainty of the statute, the motion is definitely overruled. On the question of repeal of the statute on which the prosecution is based, the objection is overruled pro forma.

Mr. Corette: May we have an exception?

The Court: You may.

Mr. Corette: And may we have an exception to the ruling pro forma, also?

The Court: That is to whether or not the statute upon which the prosecution is based as, or has not been repealed?

Mr. Corette: Yes.

The Court: Very well, the exception will be noted.

(Recess until 2:00 o'clock p. m. same date, at which time the trial of the above entitled cause was resumed.) [65]

THOMAS F. MURPHY,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Thomas F. Murphy.

Q. Where do you live, Mr. Murphy?

A. At Seattle, Washington.

(Testimony of Thomas F. Murphy.)

Q. And what is your occupation?

A. I am a special investigator for the Alcohol Tax Unit for the Bureau of Internal Revenue.

Q. That is a department of the United States Government? A. United States Treasury.

Q. How long have you been employed by the United States Government?

A. For approximately twelve years.

Q. And were you in such employ all of this year up to the present time? A. Yes.

Q. Now, do you know by sight or otherwise the defendant Edgar Dehne?

A. Yes, I have seen him in the United Cigar Store here in Butte.

Q. And when and where did you first see him?

A. I saw him in the United Cigar on January 12, 1939.

Q. Was any one there with you, or accompanied you to the place? A. Yes.

Mr. Corette: We object to the introduction of any testimony prior to March 9, 1939, which is the date of the first [66] offense set forth in the indictment; and for the further ground it is incompetent, irrelevant, and immaterial.

The Court: Overruled.

Mr. Corette: Exception, please.

The Court: Exception will be noted.

Q. Did you have a conversation with him?

(Testimony of Thomas F. Murphy.)

A. I was accompanied by investigator in charge, Mr. Deneen, and investigator Mr. Cosgriff, of the Alcohol Tax Unit. Yes, I had a conversation with Mr. Dehne.

Q. Did you inquire of him who the manager of the store was? A. Yes, I did.

Q. What did he say?

A. He said he was the manager.

Q. Go ahead and relate to the court and jury the conversation you had at that time.

A. I told him we were from the Bureau of Internal Revenue, and I asked him if he handled rubbing alcohol in the cigar store, and he said he did. I asked him if he placed any restriction on the sale of it, and he said no, that he sold it to any one who asked for it, and I asked him under all conditions, and he said yes. So, I then told him of the contents of Treasury Decision 4750, and told him it placed a definite restriction on the sale of rubbing alcohol. I also reminded him he had been twice warned before that he was selling this alcohol for beverage purposes, and he admitted that he had received two previous warnings.

The Court: Tell us what he said, and not what he admitted, that is your conclusion.

The Witness: He told me: "Yes, that was true." Mr. [67] Cosgriff was there, and he admitted he had been warned twice by Mr. Cosgriff.

(Testimony of Thomas F. Murphy.)

The Court: The court's order is that you use his words as nearly as you recall and not state your conclusion as to what he did or did not. Just what you said and what he said.

The Witness: I told him that he had been twice warned before, and he admitted that; he said that that was true.

The Court: Just a minute: I told you not to state your conclusions. Use his words. What did he say?

The Witness: He said that was true, that he had been warned twice before.

Q. Just proceed with the rest of the conversation as you recall it.

A. I explained, I told him that the Treasury Decision 4750 places a definite responsibility on the seller of denatured alcohol. He stated that he received the alcohol from the headquarter's office in San Francisco; that they stocked him with the alcohol, and as long as they continued to stock the Butte store with alcohol that he would sell it to any one who came in and asked for it.

Q. Was that the conversation as you recall it?

A. Yes. I also told Mr. Dehne that some of this was being diverted for beverage purposes, and he said he was aware of that, but he repeated again, as long as the San Francisco office furnished him with alcohol that he was going to sell it.

Q. Is that all the conversation now? Have you given it as you recall it?

(Testimony of Thomas F. Murphy.)

A. Yes, that is the conversation as I recall it.

Mr. Brown: I offer in evidence, if the court please, Government's Exhibit 1, the certificate from the Secretary of [68] State that the defendant corporation is a corporation.

Mr. Corette: No objection.

The Court: It will be admitted.

Which said document was marked Plaintiff's Exhibit 1 and is as follows:

"3443

PLFFS. EX. 1

"Department of the Secretary of State
(Cut of the State Capitol Building)
of the
State of Montana

"I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that

United Cigar-Whelan Stores Corporation, a corporation organized and existing under the laws of the State of Delaware, filed in this office, as required by law, on February 17, A. D. 1938, a duly certified copy of its Articles of Incorporation and was on said date qualified to do business in the State of Montana and is at the date of this certificate qualified to do business in the State of Montana.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State of Montana,

(Testimony of Thomas F. Murphy.)
at Helena, the Capital, this seventh day of November, A. D. 1939.

(s) SAM W. MITCHELL
Secretary of State.

By
Deputy.

[The Great Seal of the
State of Montana]

Mr. Brown: You may cross examine. [69]

Cross Examination

By Mr. Corette:

Q. This conversation took place, Mr. Murphy, in January of 1939? A. Yes.

Q. Do you remember the date?

A. On the 12th of January.

Q. At the same time, did you have Mr. Dehne sign any papers? A. No, I didn't.

Q. Did Mr. Cosgriff?

A. Not on that occasion, no.

Q. Did Mr. Deneen?

A. Not on that occasion, no.

Q. You stated that you told Mr. Dehne that this alcohol was being used for beverage purposes?

A. Yes, I did.

Q. How did you know that?

A. Well, either the same day or the day before I had talked to a man in the City jail who had been arrested by the police, and he was just sobering up

(Testimony of Thomas F. Murphy.)

from a drunk, and the police had taken a bottle of rubbing alcohol away from him, and this man that talked to me told me that he bought the alcohol at the United Cigar Store.

Witness excused. [70]

JULIUS JOHNSON,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Julius Johnson.

Q. Where do you reside?

A. Cour d' Alene, Idaho.

Q. What is your occupation?

A. Investigator in the Alcohol Tax Unit Bureau of Internal Revenue.

Q. For the United States Government?

A. Yes, sir.

Q. And how long have you been such investigator, Mr. Johnson?

A. About fifteen years.

Q. And were you from the first of the year, up to the present time, steadily employed as investigator, as you have testified? A. Yes, sir.

(Testimony of Julius Johnson.)

Q. Do you know the defendant, Edgar Dehne, by sight or otherwise? A. I do.

Q. When, if you recall, did you first see him?

A. First I saw him, it was on the 9th.

Q. Of what month?

A. Day of March, 1939.

Q. And do you have a recollection of about the time of day it was?

A. Yes, sir, 4:25 in the afternoon, the first time.

[71]

Q. Now, what place did you go, what place did you see him at that time?

A. At the United Cigar Store, at the corner of Main and Broadway, No. 34 North Main, City of Butte, Silver Bow County.

Q. What state, Mr. Johnson?

A. Montana.

Q. What was your purpose in going there?

A. I was sent there.

Q. Just tell me what you intended to do when you got there?

A. I was intending to buy rubbing alcohol.

Q. How were you dressed when you went in?

A. I was dressed in old overalls, a lumber jacket, shirt, and old sweater, a lumber jacket mackinaw, and slouch hat.

Q. And you say Mr. Dehne, the defendant, was in the place at the time? A. Yes, sir.

Q. Now, what did you say to him?

(Testimony of Julius Johnson.)

A. I walked up to the counter and Mr. Dehne was behind the counter, and I said: "Give me a package of cigarettes." He gave me the package of Chesterfields. And I said: "Give me a pint of alcohol." And he gave it to me and wrapped it up in a paper and handed it to me, and I walked out. I paid him thirty cents, fifteen cents for the alcohol and fifteen cents for the cigarettes.

Q. What hour of the day was that, if you recall, what hour?

A. That was at 4:25 in the afternoon.

Q. When next did you see the defendant, Dehne, if you did see him?

A. At 5:25 in the afternoon, when I went back there [72] again.

Q. The same afternoon? A. Yes, sir.

Q. An hour later? A. Yes, sir.

Q. Were you dressed any differently than you were the first time you went in?

A. No, sir, dressed the same way.

Q. What did you do?

A. I walked in. Mr. Dehne was behind the bar. I handed down fifteen cents, ten cents in silver and five pennies, and I said: "Give me a bottle of alcohol." He reached under the counter and got it and wrapped it up and handed it to me, and I walked out.

Q. Now, when were you next in the store?

A. The same evening at 7:25.

(Testimony of Julius Johnson.)

Q. Were you dressed any differently then than you have described being dressed when you first went in? A. No, sir; was the same clothes.

Q. Was there any one in there behind the counter on that occasion?

A. Cyril Varco was the name of the fellow that is clerking, was in there in charge.

Q. What, if anything, did you say to that person?

Mr. Corette: We object to the introduction of any evidence concerning any other person than Mr. Dehne, who is the person indicted in this complaint. The indictment reads: "To the defendants" throughout, which would mean Edgar Dehne and the United Cigar Store.

The Court: Overruled. [73]

Mr. Corette: Exception.

The Court: Exception noted.

Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter.

A. I walked up to the counter and I said: "Give me a box of snuff." He gave me the package, and I paid him ten cents, and I said: "Give me a bottle of alcohol, too, will you?" And he wrapped up a bottle of rubbing alcohol, and hands it to me and I walked out.

Q. When were you next in the store?

A. What?

Q. When was the next time?

A. At 8:20, or 8:25, the same evening.

(Testimony of Julius Johnson.)

Q. Who, if any one, did you see?

A. Varco was behind the counter.

Q. What, if anything, did you say at that time to Varco?

A. I laid down fifteen cents and told him that I wanted a bottle of alcohol. The same thing, he wrapped up a bottle of alcohol and handed it to me, and I walked out.

The Court: What day was this?

The Witness: This was on the 9th of March, 1939.

Q. Now, when were you next in the store, if you were in there again?

A. The next morning, which was March 10, 1939.

Q. At what time of day.

A. About 10:20 in the forenoon.

Q. Whom did you see in the store at that time?

A. Edgar Dehne, the defendant, was behind the counter. I walked in and I said: "Give me another bottle of alcohol." He [74] wrapped up another bottle of rubbing alcohol, gave it to me and I walked out.

Q. Now, when were you next in the store?

A. At about 12:20, or right after lunch, I went in again.

Q. On the same day?

A. On the same day. Clerk Varco was behind the counter. I said: "Give me another bottle of alcohol." Threw down the money, he wrapped up the bottle of alcohol, and handed it to me.

(Testimony of Julius Johnson.)

Q. When were you next in the store?

A. At about 5:00 o'clock in the afternoon, or 5:05.

Q. On what day?

A. Same day, March 10th.

Q. Who was clerking in there at that time?

A. Varco. The clerk was behind the counter.

Q. And what did you say?

A. I said: "Give me another bottle of alcohol." He reaches under the counter; wraps me up a pint of rubbing alcohol, takes my money, and I walks out.

Q. When were you next in the store?

A. I wasn't in there, back again, until the 14th of March.

Q. On March 10th you testified you went in there at 12:20, is that right? A. What?

Q. You said you were in there March 10th at 12:20 p. m.

A. Yes, I was in there on the 10th at 5:00 o'clock and went back in again at 7:00 o'clock on the 10th.

Q. On the 10th you went in there again?

A. Yes, sir. [75]

Q. Who did you see in there at that time?

A. The defendant.

Q. Mr. Dehne? A. Yes, sir.

Q. What was said by you to him?

A. The same thing. I threw down my money and said: "Give me another bottle of alcohol." He

(Testimony of Julius Johnson.)

wraps up another bottle of alcohol and takes my money, and I walks out.

Q. Now, on these occasions that you have testified to going in and purchasing this alcohol, were you dressed any differently than you have testified you were dressed the first time you went in?

A. I had the same clothes on.

Q. Now, at any time, on any of these occasions, did either the defendant Dehne or Varco inquire of you as to what you were going to do with the alcohol?

A. They did not.

Q. Or why you came back after this alcohol?

A. No, sir; they said nothing; there was no word spoken.

Q. Except what you testified to?

A. Except what was spoken by me.

Q. When was the next time you went in the place?

A. I went in there again on the 14th of March.

Mr. Corette: Object to the introduction of any evidence as to any purchase on the 14th of March as beyond the issues of the complaint or indictment.

The Court: The objection is sustained.

Q. Now, aside from the 14th, Mr. Johnson, when were you next in the store? [76]

A. On the 15th.

Q. Of what month?

A. April, I believe. Could I refresh my memory on that?

Q. Have you some notes you made?

(Testimony of Julius Johnson.)

A. Yes, sir.

Q. Were those made in your own handwriting?

A. Yes, sir, the ones I made at the time.

Q. Did you accurately set down what had occurred there? A. Yes, sir.

Q. And did that show the truth?

A. Yes, sir.

Q. And are you unable to recall this matter of dates without referring to your notes?

A. Yes, sir.

Q. All right, what day did you go in there?

A. April 15th.

Q. At what time?

A. About 9:15 in the forenoon.

Q. Who did you find in there at that time?

A. There was another clerk in there. His name is— I will have to refresh my memory on that name; I can't recall it.

Q. All right, refresh your memory from the notes made by you at the time of the occurrence, or soon after. A. Walfred Maenpa.

Q. And what did you say to this clerk?

A. He was using the telephone when I walked in, and I walked up to the counter, and he walked behind the counter, and said: "What is it?" And I said: "Give me a pint of alcohol." So he reaches under the counter, gets out a bottle of alcohol, and [77] starts to wrap it up. I said: "Haven't you got the other brand. I like that better to drink than I do this." And he said: "No, that is all I got.

(Testimony of Julius Johnson.)

“Well” I says, “that is all right, I can drink it.” I said: “Either one will put hair on your chest.” So he wrapped it up and I paid him fifteen cents and walked out.

Q. And when were you next in the store?

A. The same forenoon, the same day, at 10:45 in the morning.

Q. What clerk did you find in there at that time? A. The same clerk.

Q. All right; what, if anything, did you say to him?

A. I went up to the counter, and I said: “Give me four pints of alcohol, will you?” I said: “That other pint didn’t last long with four or five of us drinking out of it.” And he just laughed and he wrapped up four pints of rubbing alcohol, and I gave him a dollar, and he gave me forty cents back in change, which made sixty cents for the four bottles.

Q. Did you see displayed at any place in that store a United States Government Twenty-five Dollar Tax Stamp permitting the carrying on of retail liquor dealer’s business in that store?

A. I didn’t see any, and I looked for it.

Q. I will show you, Mr. Johnson, plaintiff’s Exhibit 2. After you look at that, tell me whether or not you have seen that before? A. Yes, sir.

Q. And when and where did you first see it?

A. That is the first bottle of rubbing alcohol I purchased from the defendant, Mr. Dehne, at 4:25

(Testimony of Julius Johnson.)

the afternoon of March 9, 1939. Of course, it was full at that time. Samples were taken out of it. [78]

Q. Showing you Plaintiff's Exhibit 3, have you seen that before, and which buy was that?

A. That was the second buy at 5:25, purchased from the defendant, and it was a full bottle.

Q. Now, showing you Plaintiff's Exhibit 4, I will ask you if you have seen that before?

A. Yes, sir. That is the third bottle that I purchased at the United Cigar Store from the clerk.

Q. Now, showing you Plaintiff's Exhibit 5, I will ask you if you have seen that before?

A. Yes, sir. That was the last bottle I purchased on March 9, at 8:25 p. m., from the clerk.

Q. And showing you Plaintiff's Exhibit 6, I will ask you if you have seen that before?

A. Yes, sir. A bottle purchased from the defendant at 10:20 in the morning on the 10th of March.

Q. And the Government's Exhibit 7. Have you seen that before?

A. Yes. This is a bottle I purchased from the clerk at 12:20 p. m. of March 10, 1939, at the United Cigar Store.

Q. And the Government's Exhibit 8. Have you seen that before?

A. Yes, I purchased that at 5:05 in the afternoon on March 10, 1939, at the United Cigar Store.

Q. And Exhibit 9. Have you seen that before?

(Testimony of Julius Johnson.)

A. Yes. I purchased that bottle from the defendant at the United Cigar Store at 7:00 p. m. March 10, 1939.

Q. And the Government's Exhibit 10. Have you seen that before?

A. Yes, sir. That is the first bottle I purchased [79] from the clerk on April 15, Walfred Maenpa, or whatever his name is.

Q. And Exhibit 11. Have you seen that before?

A. Yes, sir. That is a bottle that was purchased from Walfred Maenpa at the United Cigar Store.

Q. On what date?

A. That was April 11, 1939.

Mr. Corette: We ask that that be stricken.

The Court: It will be stricken as not within the issues, and, Gentlemen of the Jury, you will pay no attention to it.

Q. Exhibit 12?

A. That is one of the bottles, of the four bottles that was purchased at the United Cigar Store on April 15, 1939.

Q. Exhibit 13?

A. That is one of the four bottles I purchased on April 15.

Q. And Exhibit 14?

A. That is one of the four bottles purchased on April, 15, 1939, from the clerk Maenpa.

Q. Now, I will ask you, Mr. Johnson, whether or not all of these bottles were full at the time they were purchased? A. They were.

(Testimony of Julius Johnson.)

Q. I will ask you whether or not there was on any one of these bottles any United States government strip tax stamp, denoting the quantity and quality of the liquor? A. There was not.

Q. You are familiar with those stamps?

A. Yes, sir.

Q. And you say there was not? [80]

A. No.

Q. Was there any government stamp of any kind on the top of the bottle? A. No.

Q. Now, what did you do with those bottles of alcohol and each of them after you had purchased them?

A. I turned them over to the investigator of Alcohol Tax Unit, John Cosgriff, here in this Federal Building, at his office.

Q. At his office? A. Yes, sir.

Q. Now, there has been some quantity taken out of each of these bottles. Do you know by whom and under what circumstances, and when they were taken out? A. Yes, sir.

Q. Will you tell us about that?

A. Myself and Mr. Cosgriff took out about half out of each bottle and put it in a smaller bottle to be shipped to the Seattle head office to be analyzed.

Q. By whom?

A. Well, the chemist at Seattle.

Q. Will you tell us just how you took the sample out of each bottle, what you did?

(Testimony of Julius Johnson.)

A. Well, I opened the bottle, and Mr. Cosgriff would pour it in a small funnel, as much as he wanted, into a smaller bottle, and I would take that bottle and cork it, and put a sealing wax on it, and then we would label and initial the small bottle sent away the same as the original bottle was.

Q. And, on the sealing wax was there any impression of any kind made? [81]

A. Yes, from the Alcohol Tax Unit badge was put on the top of the sealing was before it was hard.

Q. I will show you Plaintiff's Exhibit 15 and ask you to tell me about that, Mr. Johnson.

A. That is a sample that was sent to Seattle out of an original bottle that I purchased.

Q. No, there is a label on that.

A. It is the same label that Mr. Cosgriff and I put on.

Q. You and Mr. Cosgriff put the label on there?

A. Yes, sir.

Q. And you spoke of initialling it. Do you find any initial there?

A. Yes, sir, I got my name on it.

Q. You got your name on that?

A. Yes, on all of them.

Q. Were the other samples that were sent down sent down on any differently than this one here?

A. Well, maybe a little more or maybe a little less, but tried to get about half a bottle.

Q. The same size bottle?

A. Yes, about the same.

(Testimony of Julius Johnson.)

Q. And with the identical label shown on that sample?

A. Yes, the same principle, but different times or days, I guess.

Q. Now, you spoke of having taken out a quantity which you said you took out, you and Mr. Cosgriff, to be sent to a chemist. I will ask you whether or not during the times that any of these government exhibits from number two to fourteen, not including exhibit marked 11, whether there was any change or alterations made by you at all in the contents of any of those bottles [82] while they were in your possession? A. There was not.

Q. Will you say what is the fact as to whether or not at the time you turned them over finally to Mr. Cosgriff, the bottles and their contents were in the same condition as when you purchased them, except for the sample, which you testified you took out? A. They were.

Q. Now, on each of these bottles there was a printed label, Mr. Johnson? A. Yes, sir.

Q. And on each of the bottles there is some writing on there? A. Yes, sir.

Q. Will you look at Exhibit 5 and tell me whose writing that is and when that was put on?

A. That is mine.

Q. And did you put writing on the other labels as on each exhibit conveying the same information that you wrote there?

A. I would write the time of day on all, on this

(Testimony of Julius Johnson.)

label here, and then when I got them to the office we put this label on them so I wouldn't get them mixed up.

Q. You say "this" label. You have indicated a white label on the back, extending over onto both sides of each bottle, with handwriting and type-writing? A. Yes, sir. We put that on.

Q. You and Mr. Cosgriff? A. Yes, sir.

Q. Except for the writing that appears on the printed label on each bottle, was there any other change made in the [83] printed label or the prints on each bottle? A. No, sir.

Mr. Brown: You may cross examine.

Cross Examination

By Mr. Corette:

Q. Mr. Johnson, when you first went in the United Cigar Store on 4:25 p. m., on the night of March 9, 1939, how many people were in the store?

A. I couldn't say. There was only two or three. This is a very small place, and not over two or three at any time.

Q. On the 9th of March, at 4:25 p. m., how many people were in there?

A. I never counted the number of people. They were generally busy waiting on customers, and I would walk up to the counter.

Q. Was that true at all times you testified you went in there?

A. No, the first time that I went in on April 15th there was no one in there except the clerk that was

(Testimony of Julius Johnson.)

using the telephone. That is the only time I recall when there wasn't a customer in there.

Q. At all other times, except on the 15th of April, when the clerk was using the telephone, there were other customers in there besides yourself?

A. Yes.

Q. After you and Mr. Cosgriff emptied half of these bottles into the smaller bottles, what did you do with the bottles which are here on this table?

A. Put the cap back on and put the sealing wax on which is still on. [84]

Q. Sealing wax so they couldn't be opened?

A. Yes, sir.

Q. And where did you put them?

A. Mr. Cosgriff put the bottles in a box and locked them up in the safe or vault.

Q. Then they left your possession at the time you turned them over to Mr. Cosgriff?

A. Yes.

Q. Now, you have told Mr. Brown that when you were in the store, or at the time you left the store, rather, that you made some notations on the front of these bottles?

A. Yes, I believe on every one.

Q. Showing you Plaintiff's Exhibit 2, I will ask you if you made this notation on the front of the bottle, on the label of the bottle?

A. Yes.

Q. That is your handwriting?

A. Yes.

Q. And then I believe you stated when you got together with Mr. Cosgriff—

(Testimony of Julius Johnson.)

A. He made this up and I signed it. He made it out on the typewriter.

Q. And you then put this on?

A. Put this on afterwards, yes.

Q. Did you make that for every bottle?

A. I am sure we did unless I would walk right out, walk right up where I could make a label at once.

Q. What would you say as to Plaintiff's Exhibit 6?

A. That is one of them that I walked right up to the [85] office with.

Q. What day was that?

A. That was purchased on the 3-10, at 10:00 o'clock in the morning, or 10:20 in the morning.

Q. What did you do with that bottle?

A. Walked right up to the Federal office with it.

Q. Then what did you do with it?

A. Made a label and turned it over to John Cosgriff.

Q. Each one of these bottles had a label made for them individually, after you purchased them?

A. Yes, the white label in front.

Q. Showing you Exhibit No. 7, I will ask you if you wrote anything on the face of that bottle?

A. No, I never wrote anything on the face of it. I went direct to Mr. Cosgriff's office, because I would carry it right up. And if I took it up to the hotel room first, then I would write on it.

(Testimony of Julius Johnson.)

Q. And that exhibit, what time did you make that purchase, and on what date?

A. That is on the 10th, at 12:20 p. m.

Q. Do you remember whether you came directly up to the Federal Building?

A. Yes, I know I did, as long as there is no writing on it.

Q. I hand you Plaintiff's Exhibit Number 9, and I will ask you if there is any writing on the label on the front of that exhibit. A. No.

Q. And at what time did you make that purchase?

A. At 7:00 p. m. the 10th day of March. [86]

Q. And immediately after making that purchase, what did you do?

A. I went to Mr. Cosgriff's office.

Q. Mr. Cosgriff is in the habit of having office hours at 7:00 p. m.?

A. Yes, many times, but I had a key for the office, too.

Q. When you got there, what did you do? Was Mr. Cosgriff there on that night?

A. I believe he was. He was staying around practically all the time while I was doing the work, but I wouldn't swear that he happened to be there at that moment; but I am sure he was.

Q. And handing you Defendant's Exhibit No. 8, I will ask you if there is anything on the label of that exhibit in your handwriting? A. No.

(Testimony of Julius Johnson.)

Q. What time was the purchase made of that bottle?

A. The same day, 10th of March, 5:05 o'clock p. m.

Q. What did you do after you made that purchase? A. Go up to the Federal Building.

Q. Was Mr. Cosgriff in his office at 5:05 that afternoon?

A. I suppose he was. If he wasn't, I made out the label myself.

Q. These labels, did you make some of these labels, or Mr. Cosgriff make them all? You testified that Mr. Cosgriff typed and you stamped.

A. He might have typed some and I might have. If he was there he might have typed. If he wasn't there I typed them. I couldn't remember who typed it. I know I typed some and he typed some. [87]

Q. Showing you Plaintiff's Exhibit 15, I will ask you if that is one of the bottles you and Mr. Cosgriff forwarded to Seattle?

A. Mr. Cosgriff forwarded it, if it was forwarded. I had nothing to do with that.

Q. In other words, you don't know anything about these bottles after you left them with Mr. Cosgriff?

A. No, after I helped seal them.

Q. You don't know whether they were forwarded to Seattle or not?

A. As far as I am concerned I couldn't testify to that.

(Testimony of Julius Johnson.)

Q. After you first made the purchase on March 9, 1939, did you immediately open the bottle and send part of it, or get it to Mr. Cosgriff and leave it in his possession?

A. No, them bottles were left intact until Mr. Cosgriff and I opened them.

Q. And on what date did you do that?

A. I believe on the 11th of March, and then again on the fifteenth of March, when we got the other five. The 15th of April, I mean. Pardon me.

Q. Mr. Johnson, when you purchased this alcohol, why did you purchase it? What was your reason?

A. My reason for purchasing it was because we had instructions they were selling for beverage purpose and they wanted me to try to make a purchase to see if it was the truth.

Q. When you purchased it was it your intention to use the same for beverage purposes?

A. No, it was my purpose to use it for evidence.

Q. Did you use any of it for drinking?

A. No. [88]

Q. Did you sell any of it? A. No.

Redirect Examination

By Mr. Brown:

Q. On that point, Mr. Johnson, who or what class were you simulating, or attempting to simulate, when you dressed as you did?

A. What?

(Testimony of Julius Johnson.)

Q. What class of persons were you simulating or attempting to simulate when you dressed in the manner you did? A. A bum.

Witness Excused. [89]

JOHN H. COSGRIFF,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. John H. Cosgriff.

Q. Where do you live? A. Butte, Montana.

Q. What is your occupation?

A. Investigator in the Alcohol Tax Unit, United States Treasury Department, with headquarters in Butte.

Q. Stationed at Butte? A. Yes, sir.

Q. How long have you been such investigator?

A. Since February 1st, 1929.

Q. And were you such investigator continuously during the years 1938 and up to the present time in 1939? A. I was.

Q. Do you know Edgar Dehne?

A. Yes, sir.

Q. The defendant. How long have you known him? A. Since the 14th of June, 1938.

(Testimony of John H. Cosgriff.)

Q. And what has been his occupation since you have known him?

A. Manager of the United Cigar Store, 34 North Main St., Butte, Montana.

Q. And did you have a conversation with him relative to the sale of rubbing alcohol?

A. I did.

Q. Did you bring to his attention certain regulations [90] of the government concerning that sale?

A. Yes, sir.

Q. When did you first do that?

A. On the 14th of June, 1938, I entered the United Cigar Store and served Mr. Dehne with a copy of regulations 4750, pertaining to the sale of rubbing alcohol.

Q. What, if anything, did you say to him or explain to him at that time in connection with the regulations, if you recall?

A. I read the regulations to him and asked him if he understood them, and he stated that he did, and I asked him if he would be willing to cooperate with our department in restricting the sale of rubbing alcohol to the drunks and dehorners, and Mr. Dehne stated that he would cooperate.

Q. Did you have occasion to talk with him again after that about the sale of this alcohol?

A. Yes, sir.

Q. When was that?

A. January 2nd, 1939.

Q. Where did you talk with him? About it.

(Testimony of John H. Cosgriff.)

A. In the United Cigar Store, 34 North Main St., Butte, Montana.

Q. And will you relate the conversation you had at that time, using as nearly as possible the words you used and as nearly as possible the words he used; tell us what you said and what he said?

A. I entered the store in the evening, eight o'clock or eight-thirty p. m. of January 2nd, 1939, and Mr. Dehne was on shift, and I told him that I had had complaints that he was selling rubbing alcohol to bums, and that these bums were being picked up by the police and this alcohol, of the same brand, that [91] he sold was being taken from the bums' persons. Mr. Dehne stated at that time, he said: "My boss in California sends this alcohol up for me to sell, and until I hear from him to do otherwise, I shall continue to sell it." I told him at that time that he may get in serious trouble if he continued that, and he repeated what he had first told me, that they sent it up for him to sell, his boss in San Francisco, and until he heard from him, that he would sell it until he heard differently from him.

Q. Were you present at any time after that when this same matter was discussed with the defendant Dehne, either by yourself or other officers of the government in your presence?

A. I was.

Q. When? A. January 12, 1939.

Q. Who was there on that occasion?

(Testimony of John H. Cosgriff.)

A. Investigator in charge, Mr. Deneen, Special Investigator, James Murphy, of Seattle, and——

Q. And who did the talking at that time?

A. Mr. Murphy.

Q. Mr. Murphy did? A. Yes, sir.

Q. What, if anything, did you hear Mr. Dehne say with reference to that matter, or how he was going to continue the sale of alcohol? What did he say about it?

A. He told Mr. Murphy practically the same thing he told me on the 2nd of January, 1939.

Q. What was that?

A. That his boss had sent, or shipped the alcohol up from California for them to sell, and until he received orders otherwise, that he would continue to sell the alcohol. [92]

Q. Now, I will show you the Government's Exhibit 5 and ask you if you have seen that before?

A. Yes, sir, I have.

Q. And where did you first see it, Mr. Cosgriff?

A. In room 211 of this building, Federal Building, Butte, Montana, my office.

Q. And was that turned over to you?

A. Yes, sir, it was.

Q. By whom?

A. Julius Johnson, investigator for the alcohol department.

Q. I will show you Exhibit number 3 and ask you if you have seen them before?

A. Yes, sir, I have.

(Testimony of John H. Cosgriff.)

Q. And when and where did you first see it?

A. In room 211, Federal Building, Butte, Montana.

Q. And was it turned over to you?

A. Yes, sir.

Q. By whom? A. Investigator Johnson.

Q. And on what date?

A. March 11, 1939.

Q. And as to Exhibit No. 6, on what date?

A. The same date, March 11, 1939.

Q. I will show you Exhibit No. 10, and ask you if you have seen that before and who turned it over to you, if it was turned over to you?

A. Yes, sir, this was turned over to me by Investigator Johnson on April 15, 1939.

Q. Showing you Exhibit No. 4 I will ask you if you [93] have seen that before? A. Yes, sir.

Q. And who turned it over to you and where and when?

A. Investigator Julius Johnson, on March 11, 1939, at room 211 Federal Building, Butte, Montana.

Q. Showing you Exhibit 6, I will ask you if you have seen that before and when and where, and how you got it?

A. Saw this on the 11th of March, 1939, at room 211 Federal Building; given to me by Julius Johnson, Investigator.

Q. Showing you Exhibit 17, I will ask you if you saw that before?

(Testimony of John H. Cosgriff.)

A. I received this from Investigator Johnson on March 11, 1939, in room 211, Federal Building, Butte, Montana.

Q. Exhibit 8, I will ask you if you have seen that before and when and where?

A. Yes, sir, in room 211 Federal Building, Butte, Montana, March 11, 1939; delivered to me by Investigator Johnson.

Q. Exhibit 9, I will ask you if you have seen that before and when and where?

A. Yes, sir. Delivered to me by Investigator Johnson, March 11, 1939, room 211, Federal Building, Butte, Montana.

Q. Showing you Exhibit 2, I will ask you if you have seen that before, and if you have, when and where?

A. Yes, sir, March 11, 1939; delivered to me by Investigator Johnson, Room 211, Federal Building, Butte, Montana.

Q. And Exhibit No. 12, I will ask you if you have seen that before? A. Yes, sir.

Q. When and where?

A. April 15, 1939, Room 211, Federal Building, Butte, [94] Montana; delivered by Investigator Johnson.

Q. Showing you Exhibit No. 13, I will ask you if you have seen that before, and if so when and where?

A. Yes, sir. April 15, 1939, Room 211, Federal Building, Butte, Montana, delivered by Investigator Johnson.

(Testimony of John H. Cosgriff.)

Q. Now, Exhibit 14, I will ask you if you have seen that before, and if so, when and where?

A. Yes, sir, April 15, 1939, Room 211, Federal Building, Butte, Montana, delivered by Investigator Johnson.

Q. Now, will you tell me the condition of each all of the bottles when they were delivered to you by Investigator Johnson, as to whether or not they were full or partially full. A. They were full.

Q. And when delivered to you by Investigator Johnson, will you tell me whether or not there was on the tops of the bottles, or any one of them, a United States Government Strip Tax Stamp, denoting the quantity and quality of the liquor contained therein, or the alcohol?

A. There was no stamps.

Q. Have you been familiar with the place of business of defendant corporation in Butte, Montana, the United Cigar-Whelan Stores Corporation?

A. Yes, sir.

Q. Been in there on numerous occasions?

A. Yes, sir.

Q. On any occasion you have been in there, have you seen displayed on the wall or any place else a United States Government \$25.00 Tax Stamp which permits the selling of liquor at retail?

A. No, sir. [95]

Q. Or any tax stamp of the government which permits the sale of liquor at wholesale?

A. No, sir.

(Testimony of John H. Cosgriff.)

Q. And have you seen any tax of any kind at all in there? A. No, sir.

Q. You say each of these bottles were full?

A. Yes, sir.

Q. There has been some portion of the contents of each removed. Now, will you tell me about the removal of that?

A. Yes, sir. In the presence of Investigator Johnson, he and I took samples from each and every bottle, labeled the same at the time. We took one at a time and labeled and sealed the top of the bottles we were to send for samples, and for seal we put wax across the top, and I put the seal of my badge, the Treasury Seal, in the soft wax on the sample bottles.

Q. The seal of your badge, what kind of badge is it?

A. It is a badge with the United States Treasury Seal on it. The scales and the mark in the center.

Q. What portion of that did you impress?

A. The small round portion, about the size of a dime.

Q. The middle portion, the seal portion there?

A. Yes, sir.

Q. What did you do with the bottles that you poured the samples out of, from each of those other bottles. What did you do with the other bottles which you poured the samples in?

A. Those were shipped to Mr. Ringstrom, in Seattle, Washington.

(Testimony of John H. Cosgriff.)

Q. By whom? [96]

A. By myself.

Q. Identified in any way? A. Yes, sir.

Q. In what way?

A. My signature is on the label of every bottle.

Q. I will show you Exhibit 15 and ask you if you have seen that before? A. Yes, sir.

Q. And when and where and under what circumstances did you receive that? What do you know about that bottle there?

A. This is Exhibit D, taken from the original bottle, Exhibit D, that is my Exhibit D that I had marked on the bottle, and I poured a portion of the original bottle into this one, sealed it, placed the label on it, and shipped this with several other samples to Mr. Ringstrom, the chemist at Seattle, Washington.

Q. Do you find any names or initials on there?

A. Yes, sir.

Q. What?

A. Investigator Julius Johnson's and my own initial.

Q. Did you place this label on there before shipping it to Mr. Ringstrom? A. I did.

Q. What have you to say as to whether or not, on each of the other samples that you sent down there that you placed a label of the information as to the contents of the bottle? A. Yes, sir.

Q. And with your own initials on it, is that it?

A. Yes, sir.

(Testimony of John H. Cosgriff.)

Q. In other words, is this a fair illustration of the method in which each of the other bottles were labeled and sealed [97] and sent down to Mr. Ringstrom? A. Yes, sir.

Q. In whose custody have these exhibits from two to fourteen, exclusive, with the exception of number 11, been?

A. They have been in my possession.

Q. And where have you kept them?

A. Room 211, Federal Building, Butte, Montana.

Q. Your office? A. Yes, sir.

Q. Have they been kept by you under lock and key? A. Yes, sir.

Q. Has any one else except yourself had access to those? A. No, sir.

Q. Mr. Cosgriff, what have you to say as to whether or not there has been any change at all made in the contents of those bottles, or any of those, or those exhibits, or any of them from the time you were given them, or at the time Mr. Johnson gave them to you, to the present time, except for the portion that was removed as you testified for the purpose of sampling?

A. There have been no changes at all.

Q. What have you to say as to whether or not the contents of the bottles now are exactly the same as they were when turned over to you, except for the portion removed? A. Yes, sir.

(Testimony of John H. Cosgriff.)

Q. Will you describe, briefly, this place of business of the United Cigar Whelan Stores Corporation have?

A. It is a small corner room on the corner of Broadway and Main Streets, Butte, Montana; a very small place, and they deal mostly in the sale of tobaccos, pipes, cigars, cigarettes, notions, and safety razors, and articles like that. [98]

Q. Can you tell us about what the length of the floor base is?

A. Well, I don't believe the room is over twenty feet long.

Q. And the width?

A. The width would be only possibly twelve feet, not over that.

Q. Is it on the ground floor, level, or above or below?

A. It is on the ground floor.

Q. It is on the street level. Is that the ground floor?

A. Yes, sir.

Q. Now, this alcohol has marked on the label there Wecol, or Weko. You know that do you? You have examined it and know that?

A. Yes, sir.

Q. What place of business sold those two brands of alcohol, exclusively?

Mr. Corette: To which we object on the ground the witness is not qualified to say or to testify.

The Court: You might qualify him.

Q. Mr. Cosgriff, did you make a check of business establishments for the purpose of determining

(Testimony of John H. Cosgriff.)

what establishments in Butte, the City of Butte, sold the product Weko or Wecol? A. I did.

Q. And what business establishments did you examine or check?

A. I examined every drugstore.

Q. Every drugstore in Butte, Montana?

A. Yes, sir, and in my district.

Q. And what did you find from an examination of those [99] drugstores?

A. No other store in my district sells those two particular brands of rubbing alcohol.

Cross Examination

By Mr. Corette:

Q. I think you said, Mr. Cosgriff, that on March 11 Agent Johnson turned over to you eight bottles of alcohol, being Plaintiff's Exhibits 5, 3, 4, 10, 7, 8, 6 and 9. Is that correct?

A. Well, those that he turned over to me on that date are marked with the date on them.

Q. Well, what dates did he turn alcohol over to you?

A. There were two or three separate dates alcohol was turned to me, beginning with the 9th of March and the 10th, and 15th of April.

Q. Then, it was not all turned over to you on March 11, that is the eight bottles?

A. I had the eight bottles by March 11.

Q. After each bottle was purchased, was it turned over to you, or were they all turned over at once?

(Testimony of John H. Cosgriff.)

A. As near as I can remember they were turned over as Mr. Johnson purchased them.

Q. Will you explain why this (indicating) is on this bottle and not on the others?

A. Yes, sir. The case I had this stored in was full with the samples that had been sent to the chemist, and the original bottles, and I didn't have room for this bottle, and the sample taken for it, so when I came into the office today I got a little wax off on top of my clothes and put this on today.

Q. It is still sealed, however.

A. Yes, sir. [100]

Q. This bottle of Wecol has on the back of it a label which states it was bought on March 9, 1939?

A. This one, yes.

Q. And that is Exhibit No. 4? A. Yes, sir.

Q. And in your Exhibit No. 3, a bottle of Wecol, states on the back that it was purchased on March 9, 1939? A. Yes, sir.

Q. And your plaintiff's Exhibit 5, being a bottle of Wecol, states on the back that it was purchased March 9, 1939? A. Yes, sir.

Q. Handing you, this bottle of rubbing alcohol compound, apparently being a bottle of Weko, showing on the back that it was purchased, March 9, 1939,—that is Plaintiff's Exhibit No. 2. Is that correct? A. Yes, sir.

Q. Mr. Cosgriff, did you at any time have Mr. Dehne, the defendant here, and Mr. Varco, one of his clerks, sign a statement with you?

(Testimony of John H. Cosgriff.)

A. Yes, sir, I did.

Q. What was that statement?

A. It was to the effect of the type of business they engaged in, the type of goods that they handled there——

Mr. Brown: I want to object. I think the statement would be the best evidence of its contents.

The Court: Your objection is well taken.

Q. Mr. Cosgriff, can you produce those statements which you had Mr. Dehne and Mr. Varco sign? A. I can produce a copy of it.

Mr. Brown: I have the original here, which you may [101] have (handing document).

Q. Mr. Cosgriff, I hand you Defendant's Exhibit 16, and I will ask you what that is?

A. That is a statement obtained by me from Mr. Dehne on the 23rd of March, 1939.

Q. I hand you, now, Defendants' Exhibit 17, and ask you what that is?

A. That is a statement taken by me from Cyril Varco, clerk in the United Cigar Store, on the 29th of March, 1939.

Mr. Corette: I offer in evidence Defendants' Exhibits 16 and 17.

Mr. Brown: We have no objection.

The Court: They will be admitted.

Documents marked Defendants' Exhibit 16 and Defendants' Exhibit 17, and are as follows. [102]

(Testimony of John H. Cosgriff.)

DEFENDANTS' EXHIBIT 16

STATEMENT OF EDGAR DEHNE

I, Edgar Dehne, Manager of United Cigar Store, 34 North Main Street, Butte, Montana, make the following statement of my own free will and accord after having been advised by John H. Cosgriff, Investigator, Alcohol Tax Unit, United States Treasury Department, Bureau of Internal Revenue, that I am not obliged to make any statement or answer any questions unless I so desire.

I have been manager of United Cigar Store at Butte, Montana for 12 years, that in addition to stocks of tobacco, cigarettes and merchandise, that we also sell shaving lotions, bay rum and rubbing alcohol, and that the average sales of rubbing alcohol would be about 12 cases 2 week, at 12 bottles to the case, or about 144 bottles, per week sold in the store.

I order the stock of rubbing alcohol as needed, and that I have quit selling rubbing alcohol to anyone that I think is buying it for beverage purposes, but I cannot ask people what they are going to do with the alcohol. I will not sell more than one bottle to same person within the same day, and since I have been advised about restriction of sale of rubbing alcohol, for beverage purposes, I have refused to sell to those whom I know to be repeaters, or dehorners.

Page No. 1

Initials—E. D.

Exhibit "Z", page 1

(Testimony of John H. Cosgriff.)

Page No. 2

Statement of Edgar Dehne.

That in June of 1938, Investigator John H. Cosgriff, of the Alcohol Tax Unit, United States Treasury Department, furnished me with a copy of Treasury Decision No. 4750, relating to sale of Bay Rum, Denatured alcohol, including rubbing alcohol, governing the sale of same. At that time Mr. Cosgriff explained to me that it would be a violation of Federal Laws for anyone to sell rubbing alcohol, or bay rum to persons, whom I had cause to believe were buying the alcohol for drinking purposes. Since that time, I have been particularly careful not to sell rubbing alcohol to repeaters or other persons that I believed might want it to drink.

That in January of this year, Mr. Cosgriff again entered the store, of which I am manager and told me that he had been receiving complaints that rubbing alcohol was being purchased in the store by persons who were drinking the alcohol. That I told Mr. Cosgriff at that time, I had been refusing to sell rubbing alcohol to repeaters, and suggested to him then, that my company in San Francisco be warned, that they were the ones who were sending it up here for us to sell, and that the matter should also be taken up with them there.

That I have read the foregoing consisting of two pages, have had opportunity to make corrections

(Testimony of John H. Cosgriff.)

thereon, that this is the truth to the best of my knowledge.

EDGAR DEHNE

Edgar Dehne

Witness:

JOHN H. COSGRIFF

Exhibit "Z" Page 2

DEFENDANTS' EXHIBIT 17

STATEMENT OF CYRIL VARCOE:

I, Cyril Varcoe, clerk in United Cigar Store, 34 North Main Street, Butte, Montana, County of Silverbow, make the following statement of my own free will and accord after having been advised by Investigator, John H. Cosgriff of the Alcohol Tax Unit, Treasury Department, Internal Revenue service, that I am not obliged to make any statement or answer any question unless I so desire.

I have been employed as a clerk in the United Cigar Store, Butte, Montana for the past eleven (11) years. In addition to the usual stock of merchandise, tobacco, cigars, cigarettes, we also sell shaving lotions, bay rum and rubbing alcohol. The sales of rubbing alcohol averaged about 144 pints a week up to the last two weeks and the sales have dropped to about 75 pints per week. This rubbing alcohol is shipped to the store from headquarters store in San Francisco California. We usually order a sufficient supply to last for about two weeks. During the early part of January 1939, Mr. Cosgriff

(Testimony of John H. Cosgriff.)

met me on the street, also on a subsequent occasion and mentioned to me that he had received numerous complaints that bums and derelicts were buying rubbing alcohol in the United Cigar Store, for the purpose of drinking. He cautioned me that the sale of rubbing alcohol to repeaters and *drinks* was a violation of Federal Laws and that trouble might follow if such sales were not discontinued. I told him that in the future I would refuse to sell rubbing alcohol to any person whom I believed was buying it to drink. Since that time, I have repeatedly refused to sell to any person who was drunk or whom I believed wanted it to drink. I have never sold rubbing alcohol to any repeater, by that, I mean, I would never sell rubbing alcohol to the same customer more than once in two or three days.

I have read the foregoing statement, have had an opportunity to make corrections thereon, and this is the whole truth to the best of my knowledge.

Butte, Montana,
March 23, 1939.

CYRIL VARCOE.

Cyril Varcoe

Witness.

JOHN H. COSGRIFF.

Witness.

D. E. DENNEEN.

Exhibit "Y"

Q. You took that statement on what date?

A. The 23rd of March, 1939.

Q. This is the statement you took from Mr.

(Testimony of John H. Cosgriff.)

Varco on March 23rd? A. Yes, sir.

Q. Mr. Brown asked you if there were any United States Government Strip Tax Seals or tax mark on the top of this alcohol when you received it, and I believe you said "No". Is that correct?

A. That is right.

Q. Have you ever seen any rubbing alcohol with the United States Strip Tax on the top, or any place on the bottle? [105]

Mr. Brown: Object to that as immaterial.

The Court: Sustained.

Q. Is it not a fact, Mr. Cosgriff, that Mr. Dehne and Mr. Varco told you in January, 1939, that they would cease the sale of alcohol to any one they believed to be a dehorn or one they believed was drinking it.

A. Mr. Dehne didn't state that.

Q. Mr. Varco did? A. Yes, sir.

Q. But Mr. Dehne didn't? A. He didn't.

Witness Excused. [106]

JACK DOHERTY,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Jack Doherty.

Q. Where do you reside? A. In Butte.

(Testimony of Jack Doherty.)

Q. What is your occupation?

A. Druggist.

Q. By whom are you employed now?

A. The Owsley Drug.

Q. How long have you been employed by the Owsley Drug Co.?

A. About seven years.

Q. What character of merchandise or goods does the Owsley Drug Company carry in the regular course of its business?

A. The general line carried in drug stores, drugs and drug sundries, miscellaneous items.

Q. As a part of that do they carry rubbing alcohol?

A. We do, yes, sir.

Q. Have you made a check of such records as the Owsley Drug Company has, at our request, to determine what is the approximate average, or exact, if you can, the average sale of rubbing alcohol a week by that drug company in Butte, Montana, from about the first of January, 1939 to the 15th of April, 1939?

A. I have the records from June 1st. What dates did you say?

Q. What period of time have you records?

A. From June 1st, 1938, thru August 1st, 1939.

[107]

Q. What do those records show as an average weekly sale?

A. 23 gross for five stores, over that period.

Q. Twenty-three gross?

(Testimony of Jack Doherty.)

A. Yes, approximately four and a half gross a store for ten months.

Q. How many bottles in a gross? A. 144.

Q. And you sold how many gross?

A. About four and a half gross.

Q. In four stores in Butte?

A. No, five stores. I can't tell you definitely what each store sold. We warehouse it and ship it out to the stores.

Q. Now, did you during the period from January 1st of this year to April handle a brand of rubbing alcohol known as "Weko"? A. No, sir.

Q. Or "Wecol"? A. No, sir.

Q. You say that you are manager of the Butte store? A. Of all stores, yes, sir.

Q. Can you tell me briefly, do you have any restrictions that you observe with reference to the sale of rubbing alcohol, or selling it indiscriminately to any one that asks for it?

A. No, sir. We have certain restrictions.

Q. What are they?

A. If we think they are a hop-head, or we think the person comes in might drink it, or if he is drunk, we refuse to sell it to them. [108]

Cross Examination

By Mr. Corette:

Q. Of these five stores, how many are located in Butte? A. Two.

Q. And where are they located?

(Testimony of Jack Doherty.)

A. 501 So. Main and 62 West Park.

Q. And in each of those stores your average for ten months was four and one-half gross of alcohol?

A. Yes.

Q. Or, in other words, four and a half times 144 bottles? A. That is right.

Q. Or approximately 648 bottles? A. Yes.

Q. At what price do you sell?

A. Various; the standard price is nineteen cents, twenty-five cents and thirty-nine cents.

Q. And that depends on the grade of alcohol, the different prices?

A. Well, one, the thirty-nine cent, is a different grade, yes, but depends on the label on it. One is put up under our own label; one by the manufacturer, and under their own label.

Q. During the period from January, 1939 to April, 1939, state for the jury where, in your opinion the most alcohol was purchased in Butte.

A. I really couldn't truthfully say. 62 West Park Street would use two-thirds of what the south Main St. would use.

Q. How many of these bottles a week— I take it your bottles are practically the same size as that?

[109]

A. Yes, sixteen ounces.

Q. How many bottles a week would the West Park St. Store sell?

A. It is hard to state.

Q. Well on an average?

(Testimony of Jack Doherty.)

A. Two or three dozen bottles a week.

Q. Twenty-four or thirty-six bottles a week.

A. Yes.

Q. How many people would you say you had in your store per week at West Park St.?

A. Five or six thousand.

Q. How many purchasers have you in your store each week?

A. Five, six or seven thousand.

Q. Have you any way of determining that?

A. Yes, sir.

Q. I wonder if you could obtain for the court the average of how many persons were in your store from the first of March until the 1st of May, 1939, the average for the week. Can you obtain that from your records?

A. Just from the register, the receipts.

Q. That would be the approximate ring ups?

A. Yes.

Q. You said in selling rubbing alcohol you used some discrimination? A. Yes, sir.

Q. Tell the jury when you used discrimination, based upon a man's appearance, or just what it is, whether you sell or not sell.

A. The well dressed man comes in with the smell of [110] liquor on his breath we refuse to sell. Well, if somebody comes in that is poorly dressed and seems he might drink it, we refuse to sell, or they mention a particular brand they want we refuse to sell. Otherwise a man comes in with over-

(Testimony of Jack Doherty.)

alls we sell him as quickly as a man dressed better.

Q. In other words, the dress makes no difference to your sale. A. No, sir.

Q. Can you tell the jury whether or not you sold more than one of these bottles at a time to a person in your store? A. Yes, we have.

Q. Up to how many?

A. We have sold gross at one time.

Q. And at other times have you sold less than a gross, but more than one bottle?

A. We usually had permission or notified the Federal officers of it.

Q. Have you ever sold two of these sixteen ounce bottles to a person?

A. We may have, yes. On special sales, where we had them priced low.

Q. What would you say a low price would be?

A. Nine cents, twelve or fifteen.

Q. Did you sell any for that price from January up to April 15, of 1939?

A. No, sir. I don't think we did.

Q. What was your price sale from January, 1939 to April 15, 1939?

A. Nineteen cents, twenty-five cents and thirty-nine cents. [111]

Q. But you didn't lower that price?

A. No, sir.

Mr. Corette: We would ask the court to have Mr. Doherty obtain an estimate of the number of

(Testimony of Jack Doherty.)

persons who were in his store from March 1st, 1939 to May 1st, 1939.

Mr. Brown: I think the witness has given on the stand as close an estimate as he can. He says he could only tell by the receipts on the cash register.

Mr. Corette: Well, maybe I can ask Mr. Doherty a few more questions.

Q. Mr. Doherty, how do you base your estimate of five, six or seven thousand people a week?

A. Well, I base it on the daily sales.

Q. You base it by sale or by customer?

A. By sale.

Q. How many sales a week do you believe your register tape shows? Making it sales a day?

A. Over an average say from six hundred sales a day. It would be pretty close to between seven and eight hundred.

Q. How big is this store on west Park St.?

A. I think it is approximately eighty foot frontage and one hundred to one hundred twenty feet deep.

Q. That is one hundred to one hundred twenty feet long? A. Yes.

Q. And how wide?

A. About thirty feet, I think.

Q. How many clerk do you have in there?

A. Five and sometimes six.

Q. How many days are you open?

A. Every day in the week. [112]

(Testimony of Jack Doherty.)

Q. From what hours?

A. Every day except Sundays we are open from nine to ten at night; on Sunday from twelve to ten at night.

Redirect Examination

By Mr. Brown:

Q. You told me in gross. Did you refer to pints or quarts?

A. No, sir, pints. That is the only way we buy.

Q. You spoke in cross examination about selling in quantities at times. Under what circumstances is that, and to whom?

A. Well, Barnum & Baily Circus called for a price of gross.

Q. And that is what you had in mind, some business establishment, when you sell in quantities?

A. When an individual wants a dozen, we have, in other towns, called the Internal Revenue Department and asked if it was permissible to sell.

Q. You make an investigation about the sale?

A. We follow their instructions.

Q. Now, I will ask you, do you sell, for instance, to a certain individual unknown to you, who would come in in the same day, within the space of an hour, and two or three times under those circumstances? A. No, sir. We would not sell.

(Testimony of Jack Doherty.)

Recross Examination

By Mr. Corette:

Q. Having those eight hundred customers a day, do you recognize customers; would you recognize every individual that made a purchase from you?

A. If I personally waited on them, I think I would. [113]

Q. Would your clerks?

Mr. Brown: We object.

Q. Well, how many do you wait on a day?

A. I don't wait on any.

Q. You are manager, as I understand?

A. Yes, sir.

Q. How long since you waited on any trade?

A. Two years.

Q. You said in other towns that you asked the Internal Revenue office about the sale of more than a bottle? Have you done that in Butte?

A. No, sir.

Q. Have you sold at any time more than one bottle to an individual in Butte?

A. Not that I know of, unless, as I said before, on a special sale over a week-end, may have sold two bottles to one person.

Q. You don't know of your own knowledge?

A. No.

Q. And you don't know of your own knowledge whether or not your clerks made *made* any such sales? A. No.

(Testimony of Jack Doherty.)

Q. And you don't know of your own knowledge whether your clerks sold one dozen at a time?

A. I know they had instructions not to do that.

Q. Do you know of your own knowledge whether they made such sales?

A. As far as I know they have not.

Witness Excused. [114]

ROY H. BEADLE,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Roy H. Beadle.

Q. Where do you live?

A. Butte, Montana.

Q. Do you hold any official position in the city of Butte? A. I do.

Q. What is that? A. Police officer.

Q. How long have you been such police officer in the City of Butte? A. A year and a quarter.

Q. Are you acquainted with the defendant here, Mr. Dehne? A. I am.

Q. How long have you known him?

A. I have known Mr. Dehne for some time. I was born and raised in Butte and I noticed him

(Testimony of Roy H. Beadle.)

there in the last year and a quarter, since I was stationed on the police force.

Q. During the last year and a quarter, did you notice where he was working?

A. Yes, I noticed he was working in the United Cigar Store, the corner of Broadway and Main.

Q. During your time on the police force have you had, or have your duties required you to be stationed any where in the vicinity of the United Cigar Store? [115]

A. They have.

Q. Is that part of your beat, or post, or whatever you call it?

A. That is where I have been stationed, on the corner of Broadway and Main part of the time.

Q. For how long a time were you stationed there, Mr. Beadle?

A. Well, I have been stationed there on and off for the last year and a quarter. I wouldn't tell you exactly.

Q. Have you been stationed there the same shift, the same eight hours, or varying times?

A. At varying times.

Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, or rubbing alcohol?

Mr. Corette: To which we object on the ground and for the reason it does not tend to prove any

(Testimony of Roy H. Beadle.)

issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases.

The Court: Overruled.

Mr. Corette: Exception, please.

The Court: Exception noted.

Q. What have you observed, tell us.

A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehorns and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner.

Q. And have you noticed them coming out of the store? [116]

A. Yes, I have.

Mr. Corette: The same objection, Your Honor, to this entire line of testimony.

The Court: Very well, the objection will be noted to each question.

Mr. Corette: And exception.

Q. What have you observed with reference to anything they have brought out of the store with them?

A. I have seen them bringing out rubbing alcohol, sometimes in packages, and sometimes unwrapped.

Q. Do you know the brand of rubbing alcohol that is sold there at that store?

A. I do.

Q. What is that?

(Testimony of Roy H. Beadle.)

A. The Weko brand and Wecol brand.

Q. I will ask you whether or not during the time that I have referred to you have had occasion to make arrests of men that were intoxicated.

A. On December 2nd, 1938, I was called to North Main St. to pick up a man that gave the name of Bill McGorty, and on his person was a bottle of Weko rubbing alcohol.

Q. In what condition was he?

A. He was intoxicated, lying down on the street.

Q. Was that the only occasion, or do you know of your own personal knowledge of other occasions?

A. I have one I could particularly recall, where we were called to 226 East Broadway to pick up Collins Duggan, in a room in a drunken stupor, and he had two bottles of rubbing alcohol on his person.

The Court: We will strike this. These are individual [117] cases and have no bearing. There is no proof those bottles came from the defendants' store. You will pay no attention to it in deciding what your verdict will be. An exception will be noted on behalf of the government.

Mr. Brown: No, we don't ask for an exception.

Cross Examination

By Mr. Corette:

Q. Mr. Beadle, you said that you noticed de-horns and drunkards going into the United Cigar Store?

A. Yes, sir.

(Testimony of Roy H. Beadle.)

Q. Do you know whether or not while they were in there they purchased alcohol?

A. Well, at different times I have seen them coming out with alcohol, yes.

Q. Do you know whether those people you saw coming out were dehornes? A. Yes, sir.

Q. How did you determine that fact?

A. I have seen them drunk.

Q. Where?

A. At different places in the City of Butte here.

Q. In the last year and a quarter?

A. Yes, sir.

Q. Did you make arrests when you saw them drunk? A. I did.

Q. Have you ever purchased any alcohol in the United Cigar Store? A. No, sir.

Q. How do you happen to know the particular brands of alcohol by name? [118]

A. You could see them in the window most any time you went by the United Cigar Store.

Q. That is where you saw them by name, was in the window? A. Yes, sir.

Q. And that is where you became accustomed to that name? A. Yes, sir.

Q. While you were standing on the corner?

A. Yes, sir.

(Testimony of Roy H. Beadle.)

Redirect Examination

By Mr. Brown:

Q. What do you mean by the term "dehorn"?

A. Common use, we put on the dehorn at the police station, is a man that will drink rubbing alcohol and denatured alcohol, or bay rum.

Witness Excused. [119]

S. O. CLINTON,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. State your name, please.

A. S. O. Clinton.

Q. Where do you live? A. Butte.

Q. Are you in business? A. I am.

Q. And what is your business?

A. Drug business.

Mr. Corette: We will admit, to save time, that Mr. Clinton is in the drug business and has been for thirty years on North Main Street and sells rubbing alcohol.

The Court: Well let him tell us.

Q. Are you acquainted with the location of the United Cigar Store on Broadway and Main?

(Testimony of S. O. Clinton.)

A. Just acquainted with it, yes, I know where it is.

Q. You know where the location is?

A. Yes, sir.

Q. What street is your store on?

A. Main Street, North Main.

Q. And how far *nothr*?

A. 106 North Main.

Q. About how far north of this United Cigar Store?

A. We are the second north of the corner on the south side of the street.

Q. You selling rubbing alcohol, do you, in your store? A. We do. [120]

Q. Do you sell, or have you sold, either the brand Weko or Wecol? A. No, we don't.

Q. Have you, at my request, made an effort to determine your average weekly sales of rubbing alcohol, we will say from January 1st to the 15th of April of this year? A. I have.

Q. What would those average sales run?

A. I would say around a dozen and a half a week.

Q. Do you sell indiscriminately, or how do you make those sales? I mean, do you sell to any person that comes in and asks for it?

Q. Under what circumstances do you make a sale?

(Testimony of S. O. Clinton.)

A. If they look as tho they are drinking it we don't sell it.

Q. Do you sell to the same individual who comes back the same day two or three times within the space of an hour? A. No.

Cross Examination

By Mr. Corette:

Q. In determining to whom you sell, Mr. Clinton, does the type of clothes the person wears make any difference? A. Not a bit.

Q. The man in overalls gets the same courtesy the man well dressed does? A. Absolutely.

Q. Are these (indicating exhibits) pints?

A. Yes.

Q. Sixteen ounce pints?

A. Sixteen ounce pints. [121]

Q. Have you, at any time, sold more than one pint to any customer? A. Yes.

Q. Two or three or four pints?

A. Not more than two, unless it be a dozen. I have sold a dozen to a masseur.

Q. At the time you sold it did you know they were masseurs? A. Yes.

Q. About how many people go in your store each day and make a purchase?

A. I have no idea and have no way of getting at it.

Q. Could you estimate it for the jury?

(Testimony of S. O. Clinton.)

A. It would be a poor estimate.

The Court: He said he had no idea and no way of determining, so he doesn't know.

Q. How many clerks have you, Mr. Clinton?

A. One.

Q. May I inquire at what price you sell your alcohol for?

A. Twenty-five cents and thirty-nine cents.

Q. Twenty-five cents a pint? And thirty-nine cents a pint? A. Yes.

Witness Excused. [122]

ROBERT E. DUSSAULT,

called as a witness, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Robert E. Dussault.

Q. Where do you live? A. Butte.

Q. And what is your occupation?

A. Manager of the Main Drug stores.

Q. Where is the Main Drug store?

A. Two stores, one 12 North Main, and one 100 West Park.

Q. What, generally, what character of merchandise do each of those stores carry?

(Testimony of Robert S. Dussault.)

A. Well, drugs for prescriptions and sundries and other miscellaneous items.

Q. Is a part of their stock rubbing alcohol?

A. Yes, sir.

Q. Are you acquainted with the location of this United Cigar Store at Butte, Montana?

A. Yes, sir.

Q. Do you have one of your stores on the same street that is? A. Yes.

Q. How far from it, Mr. Dussault?

A. I would say it is about seventy-five or one hundred feet away.

Q. In the same block? A. Same block, yes.

[123]

Q. Did you, at my request, determine as accurately as you could the amount of rubbing alcohol in pints that your stores would sell a week say from the first of January to the 15th of April, of this year?

A. Yes, it would be around, approximately, about five gross.

Q. Five gross each?

A. No, five gross during that period. That would be four weeks in every month. From January to April, did you say?

Q. Yes, January to April.

A. That would be almost, about five gross in sixteen weeks.

Q. Could you give that in dozens for me?

(Testimony of Robert S. Dussault.)

A. Well, approximately, I imagine it would run about two dozen or two and a half dozen a week.

Q. Now, do you sell this alcohol indiscriminately to any person that comes in and asks for it?

A. No, if the person happens to look, rather to be on the slum type we refuse it, or unshaven, or something to that effect.

Q. Do you sell, for instance, to the same individuals who come back the same day two or three times, an hour apart? A. Never.

Cross Examination

By Mr. Corette:

Q. You said you sold about five gross in a three month period, or four month period? A. Yes.

Q. That five gross would be five times 144? [124]

A. Yes.

Q. That would be 720? A. Yes.

Q. And to determine how much you sold a week you would divide 720 by sixteen, and I believe that works out to be forty-five, would that be correct?

A. That is a little high; that is just more or less approximate.

Q. Is your five gross figured correct?

A. Well, I have figures here from June, 1938 to, I think it is, August of 1939, and that was approximately a little over eight gross, and I was taking the approximate of that.

Q. How many customers do you have a day?

(Testimony of Robert S. Dussault.)

A. Approximately it would run around two hundred.

Q. You are open seven days a week?

A. Yes, sir.

Q. Fourteen hundred customers a week?

A. Yes, about fourteen hundred or a little more.

Q. There are some men on the jury here, not from Butte. I wish you would describe exactly where your store is in relation to the United Cigar.

A. The corner of Park and Main; it is approximately on the northeast side of Park and Main; it is the fourth establishment from the corner.

Q. That is, it is north of the Consolidated Ticket office, which is on Park and Main?

A. Yes, sir.

Q. Up hill? A. Yes.

Q. About the fourth store? [125] A. Yes.

Q. And the United Cigar Company is located on the corner of Broadway and Main? A. Yes.

Q. Which is catacorner from the First National Bank? A. Yes.

Q. And at what price do you sell your alcohol?

A. Well, we have one for nineteen cents, one for twenty-five cents, and one for thirty-nine cents, and one for forty-nine cents.

Q. At any time do you sell one person more than one pint at a time? A. Yes.

Q. In passing on who you shall sell to and who

(Testimony of Robert S. Dussault.)

you shall not sell, would the fact that a man wears overalls and a heavy shirt make any difference?

A. To a certain extent it does, because any body of that type we label them more as a suspect.

Q. The fact he is not well dressed? A. Yes.

Q. And would, in your opinion, put him in a position where you would think he was not a proper person to buy rubbing alcohol? A. Yes.

Redirect Examination

By Mr. Brown:

Q. Under what circumstances would you sell more than one pint?

A. We have a special one-cent sale that we sell and celebrate twice a year, and that rubbing alcohol sells two for the [126] price of one plus one cent, and that puts it in the total two bottles for say fifty-one cents; and at different times we have sold some to masseurs, and that is about all.

Recross Examination

By Mr. Corette:

Q. What would you say was the cheapest you ever sold two bottles of alcohol for in the Main Street Drug store?

A. The cheapest we ever sold it is about two bottles for thirty-two cents.

Q. Do you happen to know what the price of alcohol was at the United Cigar Company?

(Testimony of Robert S. Dussault.)

A. Well, being interested more or less in competition with them, I have seen in their windows alcohol at fifteen cents, two for a quarter, and also fifteen cents straight.

Q. Fifteen cents or two bottles for twenty-five cents?
A. Yes.

Witness Excused [127]

VAL M. DERANA,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name? A. Val M. Derana.

Q. Where do you live? A. Butte.

Q. What is your occupation? A. Druggist.

Q. And where are you employed?

A. Colbert Drug.

Q. What character of merchandise do you handle?

A. We handle dual drugs and drug sundries and miscellaneous items.

Q. Where is it located?

A. The corner of Park and Main, South Main.

Q. City of Butte. A. Yes.

Q. Do you handle rubbing alcohol?

A. Yes.

(Testimony of Val M. Derana.)

Q. Have you at my request got as accurately as you could your average sales per week of rubbing alcohol and denatured alcohol from January 1 to April 15, 1939?

A. Well, I would say about a dozen and a half or two dozen a week.

Q. Do you use any precautions in selling rubbing alcohol to individuals, or simply sell to any one who comes in and asks for it?

A. No, we use precautions to the extent we will not [128] sell it to repeaters.

Q. What do you mean by repeaters?

A. If a man comes in and purchases a bottle of alcohol and I remember him, I would not sell him another bottle the same day; or, if a man comes in intoxicated, why we refuse him the sale of alcohol.

Cross Examination

By Mr. Corette:

Q. How many customers do you believe you have in your store each week?

A. Well, it will average about one hundred fifty customers a day.

Q. You are open seven days a week?

A. Yes, we are closed three hours in the afternoon on Sunday.

Q. In determining who you shall sell to, does the clothes a man has on make any difference?

A. Not a great deal.

(Testimony of Val M. Derana.)

Q. A man with overalls on gets the same consideration as the man that is well dressed?

A. If we figure he is using it in good faith.

Q. Have you at any time sold more than one bottle of alcohol at the same time to the same person?

A. Yes.

Q. At what price do you sell your alcohol?

A. Ordinarily our price is nineteen cents, and fifteen cents, and then we have sales on, one cent sale, where we sell two for twenty-six cents, for the cheaper alcohol.

Q. How often do you have sales?

A. Twice a year. [129]

Q. Have you ever sold it less than that for the two bottles?

A. No.

Redirect Examination

By Mr. Brown:

Q. The circumstances under which you sold more than one bottle to an individual at the same time was what?

A. That was usually masseurs and doctors, where they take advantage of the price of the alcohol.

Recross Examination

By Mr. Corette:

Q. Do you know whether or not there have been sales to any body else besides masseurs and doctors for over one pint of alcohol?

(Testimony of Val M. Derana.)

A. Only on the one cent sale when they have to buy two bottles at the price of one, plus one cent.

Witness Excused [130]

HUGO RINGSTROM,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. What is your name?

A. Hugo Ringstrom.

Q. Where do you live?

A. Seattle, Washington.

Q. What is your profession? A. Chemist.

Q. And did you attend a University or college,
Mr. Ringsyrom? A. Yes, sir.

Q. And what course did you graduate in?

A. In chemistry.

Q. In what university for the chemistry?

A. The University of Minnesota.

Q. What time is required to complete the course?

A. Four years, and the same thing in chemistry.

Q. How long did you stay there?

A. Five years.

Q. Did you obtain your degree? A. Yes, sir.

Q. A degree of what?

(Testimony of Hugo Ringstrom.)

A. Bachelor of science and of chemistry.

Q. When did you graduate? A. 1915.

Q. Did you practice your profession as a chemist after graduating in 1915? A. Yes, sir. [131]

Q. For what period of time have you practiced your profession as a chemist?

A. All the time, except about two years.

Q. What is your present employment, if any?

A. With the Alcohol Tax Unit of the United States Government.

Q. With your post out in Seattle?

A. Yes, sir.

Q. How long have you been employed by the alcohol Tax Unit as a chemist?

A. I have been with the Alcohol Tax Unit since it was formed, and in similar work since 1923.

Q. Now, is it part of your duties down there to analyze substances sent to you to determine whether they contain alcohol or not? A. Yes, sir.

Q. Over what territory are these substances sent in?

A. The four northwestern states and Alaska.

Q. You made many of such analysis, have you?

A. Yes, sir.

Q. I will ask you, Mr. Ringstrom, whether or not you have seen the government Exhibit 15?

A. Yes, I have.

Q. And when and where did you first see it?

(Testimony of Hugo Ringstrom.)

A. In the laboratory of the Alcohol Tax Unit in Seattle, Washington.

Q. And when?

A. I have to refer to my cards.

Q. Do you have a memorandum that you made?

A. Yes, sir. [132]

Q. Did you make it yourself? A. Yes, sir.

Q. At or near the time you received these?

A. Yes, sir.

Q. And at the time you made that memorandum, did you yourself record on the paper the facts as they were? A. Yes, sir.

Q. And you are unable to testify without the aid of that memorandum?

A. I don't remember the date.

Q. All right, give me the date.

A. March 17, 1939.

Q. Now, is it on this? A. Yes, sir.

Q. How did that come to you in Seattle, if you know? A. By express.

Q. And how was it packed?

A. It was sealed and expressed in a cardboard carton.

Q. Were there other similar articles in there, except Exhibit 15? A. Yes, sir.

Q. How many of them were there?

A. Eight in all.

Q. And they were all shipped in there, were they? A. Yes, sir.

(Testimony of Hugo Ringstrom.)

Q. Now, you will observe a white label printed on this Exhibit 15? A. Yes, sir.

Q. And were labels containing like information on the other seven? [133] A. Yes, sir.

Q. And, now, with reference to—I see a seal at the top there. Who put that on there if you know?

A. I did.

Q. Was there on Exhibit 15 and on the other seven that were with it one of those sealing wax seals on the top?

A. There was a sealing wax sealed on there.

Q. Describe that.

A. It was a wax of the same color and standard, as far as I could tell, the same as this. The impression there was the insignia of the Treasury Department.

Q. On the seal that came to you?

A. Yes, sir.

Q. Had the seal on that Exhibit 15, that wax seal, been broken? A. No, sir.

Q. Or on the other seven that came to you?

A. No, sir, it was not.

Q. Did you break the seal? A. Yes, sir.

Q. For what purpose?

A. To analyze the contents.

Q. Did you analyze the contents of Exhibit 15?

A. Yes, sir.

Q. And of the other exhibits? A. Yes, sir.

Q. And what did you find Exhibit 15 to be?

(Testimony of Hugo Ringstrom.)

A. Rubbing alcohol.

Q. Did you find that it contained alcohol?

A. Yes, sir. [134]

Q. And how much by volume, Mr. Ringstrom?

A. The apparent proof 147.6.

Q. What have you to say as to the contents of each of the eight bottles sent to you? What did you find them to be?

A. They common rubbing alcohol.

Q. And the proof of them varied from what, the apparent proof?

A. Those eight, the apparent proof varied from 147.6 to 148.8.

Q. And could that alcohol you received be drank and consumed internally? A. Yes, sir.

Mr. Brown: If the court please, we offer now in evidence the Government's Exhibits numbered two to fourteen, both inclusive, with the exception of number eleven.

Mr. Corette: To which we object on the grounds and for the reasons that it is incompetent, irrelevant and immaterial; that there is no showing that the alcohol remained in the possession of the persons who have testified at all times. That the witness on the stand testified he received eight pints or eight samples of alcohol in small bottles, whereas the two previous witnesses, namely Julius Johnson and John Gosgriff testified that they mailed to the wit-

(Testimony of Hugo Ringstrom.)

ness on the stand or to his laboratory samples from twelve bottles of alcohol. And for the further reasons that the introduction of this evidence will not tend to prove or disprove any fact at issue in this case.

The Court: The objection will be overruled so far as Exhibits two to nine, both inclusive are concerned. As to exhibits ten to thirteen it will be sustained,—the exhibits said to be purchased on April 13th. The witness said he received eight [135] bottles in March.

Mr. Corette: May we have an exception to the part denied?

The Court: The exception will be noted.

(Objects marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.)

Q. Mr. Ringstrom, as to Exhibit 15, when was that received?

A. This was received on March 17, 1939.

Q. Now, after you took the sample from that exhibit there, what did you do with that exhibit?

A. Kept it in my possession until October 16, 1939.

Q. Then what did you do to it?

A. At that time I sealed it in the present condition, and turned it over to our chief clerk to be shipped to Montana.

Q. You made no change in it at all?

A. No.

(Testimony of Hugo Ringstrom.)

The Court: Did you receive any samples from the Alcohol Tax Unit in Butte during the month of April, 1939? A. Yes, sir.

Mr. Brown: I have those here, and I will have to put Mr. Cosgriff on to testify as to those.

The Court: Put him on and get the situation cleared up.

Witness Excused Temporarily [136]

JOHN H. COSGRIFF,

a witness heretofore on the stand, being recalled by the plaintiff, testified as follows:

Direct Examination

By Mr. Brown:

Q. With respect to the Government's Exhibits 10, 12, 14 and 15. I will ask you to examine those and tell me whether or not a sample from each was sent to Mr. Ringstrom? A. Yes, they were.

Q. And when were they sent?

A. There were two shipments——

Q. I am asking you about these last four. Did you send them?

A. There were two different shipments.

Q. All right.

A. These that were purchased on the 15th of April, 1939 were mailed or expressed shortly afterwards.

(Testimony of John H. Cosgriff.)

The Court: Now what exhibits are those?

A. No. 14, Exhibit 10, Exhibit 13 and Exhibit 12 were expressed shortly after the 15th of April, 1939.

Q. To whom?

A. To the chemist at Seattle, Washington.

Q. Now, do you have here the exhibits that were sent down? A. Yes, sir, I have.

Q. Can you select those from the box here?

A. Yes, sir. (Witness complies.)

Q. Now, with reference to Plaintiff's Exhibit 18, I will ask you if you have seen that before?

A. Yes, sir, I have.

Q. And when and where? Tell us all about it.

[137]

A. This is a sample taken from a bottle of the rubbing alcohol.

Q. Can you tell us the bottle? Have you any identifying mark on that by which you can identify the Government's exhibit it was taken from?

A. "J-4". This is it.

Q. Government's Exhibit 18 was taken from the Government's Exhibit 14? A. Yes, sir.

Q. By yourself? A. Yes, sir.

Q. What was done with it?

A. This sample was shipped to Seattle, Washington to the United States chemist there.

Q. About when?

A. Shortly after the 15th of April, 1939.

Q. And by what method of transportation?

(Testimony of John H. Cosgriff.)

A. By the American Railway Express.

Q. How was the label that is placed on there, who placed the white label on there?

A. I did, Mr. Johnson and myself.

Q. What was done by you to insure that the contents of the bottle would remain in there while in process of transportation?

A. I placed a cork in the bottle, cut the cork in even with the top, sealed it with red sealing wax, and placed the impression of my government badge on the sealing, hot wax, and made the impression of the Treasury Seal on the top of the bottle.

Q. And addressed to whom?

A. The chemist at Washington, Mr. Ringstrom.

[138]

Q. Now, showing you Plaintiff's Exhibit 19, can you tell me from what Government exhibit that came?

A. "J-3" is the mark I placed on the bottle, Exhibit J-3.

Q. Now referring to the Government's Exhibit 13, can you tell me what the contents of 19 came from?

A. Yes, the contents of the bottle Exhibit 19 came from the bottle Exhibit 13.

Q. Now, will you just tell me when and how you sealed that and what you did with it.

A. I sealed it with red sealing wax over the top

(Testimony of John H. Cosgriff.)

of the cork and placed the impression of my badge on the hot wax.

Q. On what portion of the top and what impression did it make? A. The Treasury seal.

Q. And who did you send it to?

A. To Mr. Ringstrom, chemist at Seattle, Washington.

Q. Showing you Exhibit 20, did you put the contents of that in there? A. Yes, sir.

Q. And from what exhibit did that come?

A. "J-2".

Q. Now, referring to Government's Exhibit 12, what have you to say as to the relationship between Exhibit 12 and the proposed Exhibit 20?

A. The contents in the bottle Exhibit 20 came from the bottle Exhibit 12.

Q. And after you had placed it in the bottle, what did you do about labeling it? [139]

A. Yes, sir, I did.

Q. What did you do?

A. Placed a cork on the bottle, sealed the top of the cork with sealing wax, and placed the impression of the badge on the top of hot wax, which was the Treasury seal, and sent it to the chemist, Mr. Ringstrom, at Seattle, Washington.

Q. How soon?

A. Shortly after the 15th of April, 1939.

Q. Showing you Government Exhibit 21, will you identify the proposed exhibit, out of which the contents of that came?

(Testimony of John H. Cosgriff.)

A. This is Exhibit "J-1".

Q. How many exhibits did you send down on the 15th or after the 15th? A. I sent five.

Q. Now, you have only taken, at my request, you took four out of there? A. Yes, sir.

Q. Now, will you go and get the other out of there that you sent?

(Witness complies)

Q. Well, now, I show you Exhibit 22. Tell me who put the contents of that in the bottle?

A. I did.

Q. And where?

A. In room 211 of this building.

Q. And who put the label on? A. I did.

Q. And when?

A. On the 15th of April, 1939.

Q. Now, can you identify the Government's Exhibit [140] from which that came?

A. Yes, sir.

Q. What is it? A. Exhibit "I".

Q. Handing you Government's Exhibit 10, will you tell me what relationship is there between Exhibit 10 and Exhibit 22?

A. Exhibit 10 is the original bottle; Exhibit 22 is the bottle the sample was poured in.

Q. After you had poured the sample in there, what did you do with it?

A. Placed in a cork, sealed it with wax, placed an impression of the badge from the Treasury De-

(Testimony of John H. Cosgriff.)

partment on the hot wax, and shipped the sample to Mr. Ringstrom at Seattle.

Q. By what means of transportation?

A. Railway Express.

Q. And about when?

A. Shortly after the 15th of April, 1939.

Mr. Brown: You may cross examine.

Cross Examination

By Mr. Corette:

Q. How many bottles did Mr. Johnson turn over to you? A. Thirteen. When?

Q. I mean following April 15? A. Five.

Witness Excused. [141]

HUGO RINGSTROM,

a witness heretofore on the stand on behalf of plaintiff, being recalled, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Ringstrom, I show you Government's Exhibits 18, 19, 20 and 22, and I will ask you if you have seen any or all of those before?

A. I have.

Q. What do you mean?

A. I have seen all of them.

Q. When and where did you first see them?

(Testimony of Hugo Ringstrom.)

A. On April 21, 1939, in the laboratory of the Alcohol Tax Unit in Seattle, Washington.

Q. And did you make an analysis of the contents of each of those exhibits? A. Yes, sir.

Q. When they came to you in what condition were they with reference to being sealed? Or not sealed? A. They were sealed.

Q. Will you describe to us just exactly the way they were sealed when you got them?

A. Over the cork was a red sealing wax with the impression of the Treasury Department on the wax.

Q. By what method of transportation did it appear they had come to you? A. By express.

Q. Did you make an analysis of the contents of each one of those exhibits? A. Yes, sir.

Q. And what did you find it generally to be?

[142]

A. Rubbing alcohol.

Q. Did you make a note of the apparent proof?

A. Yes, sir.

Q. Will you give that to us?

A. The apparent proof varied between 146.6 and 147.2 in proof.

Mr. Brown: I now offer in evidence Government's Exhibits 10, 12, 13 and 14.

Mr. Corette: To which we object. And may the objection which was made at the first time these exhibits were offered be considered repeated at this time?

(Testimony of Hugo Ringstrom.)

The Court: The objection will be overruled.

Mr. Corette: Exception, please.

The Court: The exception will be noted.

(Objects marked Plaintiff's Exhibits 10, 12, 13 and 14.)

Q. Now, Mr. Ringstrom, I want to ask you whether or not all of these exhibits which you examined denatured alcohol was used in the manufacture of those exhibits? A. Yes, sir.

Q. What do you mean by "denatured alcohol"?

A. Alcohol that is rendered unfit to be used as a beverage.

Q. Explain further how denatured alcohol is made and what it is. Is it first alcohol?

A. It is first distilled as pure grain alcohol, and then it is denatured by the distiller or the denaturer, that is authorized by the government to denature alcohol.

Q. What is the process?

A. By adding a substance that renders it unfit to be used as a beverage. [143]

Mr. Brown: I move that that be stricken as a conclusion of the witness.

Q. What is put in there?

A. For rubbing alcohol the distiller adds two substances methyl propyl ketone and methyliso butyl ketone. The denaturer adds three and a half gallons of methyl propyl ketone and half a gallon

(Testimony of Hugo Ringstrom.)

of methyliso butyl ketone alcohol to every one hundred gallons of grain alcohol.

Q. Now, you told me that it could be that rubbing alcohol and denatured alcohol could be drunk, and then you further stated it was unfit for consumption, for human consumption. Do you make a distinction there by the use of those two answers?

A. Alcohol as it is denatured is for ordinary purposes considered unfit for use as a beverage, but that does not mean that it cannot be misused; that some people may drink it as a beverage.

Q. When you say "proof" as referring to alcohol by a certain proof—

A. Proof is the term used to determine the strength of alcohol or whiskey, alcohol, liquids; that the proof is twice the percentage of alcohol by volume.

Cross Examination

By Mr. Corette:

Q. How much percent is there, alcohol, in a pint of this?

A. The apparent percentages there would be about 73½ percent.

Witness Excused. [144]

Whereupon an adjournment was had until Wednesday, November 15, 1939, at 10:00 o'clock a. m., at which time the trial was resumed.

Mr. Brown: We rest, Your Honor.

Mr. Corette: If your Honor please we would like to make a motion.

(Jury retires from court room.)

Mr. Corette: Comes now the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne, at the close of the evidence produced in this case by the plaintiff, the United States, and at the conclusion of and close of the evidence produced by the plaintiff, The United States, and moves the court to direct a verdict in favor of the defendant, and direct the jury to find a verdict of acquittal and for the dismissal of the action upon the following grounds and for the following reasons:

1st that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence [145] to show that the defendants, or either of them,

were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21, inclusive, should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The Court: (After remarks) The motion is denied.

Mr. Corette: May we have an exception.

The Court: And the court at this time definitely denies the motion of the defendants to dismiss

counts 1 and 11 to twenty-one, and the contention of counsel for the defendants that the law which the prosecution is based upon has been repealed, is definitely and finally overruled. [146]

Mr. Corette: May we have an exception to both rulings, Your Honor?

The Court: Your exception to each and all of these rulings will be noted. [147]

EDGAR DEHNE,

one of the defendants herein, called on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. Will you state your name?

A. Edgar Dehne.

Q. What is your occupation?

A. Clerk in the United Cigar Store.

Q. Where?

A. United Cigar Store, 34 North Main, Butte, Montana.

Q. Where do you live?

A. 119 West Copper Street.

Q. Are you married? A. Yes, sir.

Q. Have you any children? A. Three.

Q. How long have you lived in Butte?

A. As near as I can figure, twenty-five years.

Q. How many years have you been connected with the United Cigar Store?

A. Going on fourteen.

(Testimony of Edgar Dehne.)

Q. And in what capacity?

A. Twelve years as manager, and two years chief clerk.

Q. The twelve years as manager, has that been the last twelve years? A. Yes, sir.

Q. How many clerks are employed at that store?

A. Three.

Q. What are their names?

A. The first clerk is Cyril Varco, and the relief [148] clerk is Walfred Maenpa.

Q. Will you explain to the jury how many hours a day each one of you work?

A. Well, we work a split shift or swing shift. The store is open from seven to eleven. The man that opens in the morning at seven, he works until twelve noon. At noon the clerk comes on and works from noon to six; then the man that opened in the morning works from six at night to eleven, and it is the opposite for the clerk the next day.

Q. One opens one day and one the next?

A. One opens one day and one the next.

Q. Where does the relief clerk come in?

A. We are allowed, by law, forty-eight hours altogether, so we have to have a relief clerk working the balance of the day.

Q. Does that give you clerks any time off?

A. One day a week.

Q. And who is the relief clerk?

A. Walfred Maenpa.

(Testimony of Edgar Dehne.)

Q. And Cyril Varco is the regular clerk?

A. He is the clerk, yes, sir.

Q. Have you been in court during the entire trial? A. Yes, sir.

Q. You are the Edgar Dehne that is charged as being the defendant in this action?

A. Yes, sir.

Q. Did you hear Mr. Julius Johnson, the gentleman over here, testify? A. Yes, sir.

Q. I believe, if I am correct, that he testified that [149] on the 9th day of March, 1939, at approximately 4:25 in the afternoon, he purchased one pint of alcohol from you when you were on duty in the store, and that he was dressed in overalls, a shirt and a sweater. Do you remember making such a sale? A. I do not.

Q. He also testified that on the 9th day of March, at 5:25 p. m., or approximately that time, he purchased one pint of alcohol from you in the stores of the United Cigar Company, Broadway and Main, at Butte, and that he was dressed in overalls, rough shirt and sweater. Do you remember making that sale? A. I do not.

Q. He also testified that on the morning of March 10, at 10:20 a. m., while dressed in those same clothes, he purchased one pint of alcohol from you. Do you remember making that sale?

A. I do not.

Q. He also testified that on March 10, at 7:00 o'clock p. m., he purchased one pint of alcohol from

(Testimony of Edgar Dehne.)

you while dressed in the same clothes. Do you remember making that sale? A. I do not.

Q. Mr. Dehne, what was the selling price for your alcohol?

A. Well, when I first went to work there two for a quarter, fifteen for one, or two for a quarter. Then we had a price change come in and fifteen cents a bottle straight.

Q. I will ask you if you could tell the jury approximately how many persons came into your store on the day of March 9, 1939, if you have any records? A. Yes, sir.

Q. Those records you have have been kept in the regular course of your business? [150]

A. Yes, sir.

Q. And they are true and accurate records?

A. Yes, sir.

What date?

Q. March 9, 1939. In your records do you keep a list of the number of customers, or is it determined from sales?

A. We have a customer counter on the register, and it registers every sale that is made.

Q. And on March 9, 1939, how many customers?

A. Four hundred forty-two customers.

Q. And on March 10?

A. March 10, four hundred eighty-eight.

Q. And during the week, starting with March 1st, from March 1st to March 7, how many customers did you have during that week?

(Testimony of Edgar Dehne.)

A. March 1st to 7, three thousand two hundred sixty-eight customers.

Q. And during the second week, from March 7 to March 14, how many customers did you have?

A. We had three thousand one hundred nineteen.

Q. For the two weeks, how many customers?

A. The total for the two weeks, six thousand, three hundred eighty-seven.

Q. Mr. Dehne, can you tell the jury how many persons in your opinion come into your store daily that do not buy anything? In other words, that do not become customers, and would not be shown on your records?

A. I would say about two hundred.

Q. About two hundred? A. Yes, sir.

[151]

Q. Calling your attention to April 15, 1939, will you tell the jury how many customers you had in your store on that date? You may refer to your records. A. Five hundred sixty-nine.

Q. And during that entire week of April 15. But start with April 1st to April 7, how many customers did you have in your store?

A. From April 1st to April 14, that is two weeks, totalled here six thousand eight hundred ninety-six.

Q. I didn't hear that figure.

A. Six thousand eight hundred ninety-six.

Q. Six thousand eight hundred ninety-six in the

(Testimony of Edgar Dehne.)

two weeks, and how many customers for the first week?

A. Three thousand five hundred seventeen.

Q. And those figures which you have given also include only the customers that have become purchasers? A. Just purchasers.

Q. And in addition you believe about two hundred people come in the store a day in addition to that?

A. Yes, that is to ask for change, or stamps, but all those are not registered on the register.

Q. At this store, the United Cigar, I believe you sold alcohol? A. Yes, sir.

Q. What kind of alcohol?

A. Two brands, Weko and Wecol.

Q. In the sale of this alcohol, will you state to the jury whether you ever sold more than one of these bottles of alcohol to a person?

A. Yes, sir, many times. [152]

Q. Will you state to the jury whether or not three Federal men called upon you during 1939?

A. Yes, sir.

Q. Do you remember approximately the date?

A. No, I am not so good on dates, but I could tell just about along the first of the year.

Q. Do you know their names?

A. Well, I know Mr. Cosgriff. He had two other men with him.

Q. The man that was in court yesterday—this gentleman (indicating)?

(Testimony of Edgar Dehne.)

A. That is Mr. Cosgriff.

Q. Do you recognize any of the other two gentlemen?

A. I believe the gentleman with the glasses on; this gentleman over here with the glasses.

Q. That is Mr. Murphy.

A. I can't tell their names.

Q. And this gentleman over here is Mr. Deneen?

A. Yes.

Q. These gentlemen called on you?

A. Yes, sir.

Q. At that time what did they say to you?

A. Well, Mr. Cosgriff introduced these two gentlemen, and he said, "Mr. Dehne, do you remember me warning you about the sale of rubbing alcohol several months ago?" And I said: "Yes, I do." And I said I would continue "to sell rubbing alcohol as long as it was sent in to me by the company. I am supposed to sell it." And then he said "Well, I continue to find that you are still selling rubbing alcohol." And I said: "Yes, and I am going to continue on selling as long as it is sent in by the company, but I have [153] cut down as best we know how in selling it to drunkards or dehorn's". Mr. Cosgriff might not be aware of this fact, but I have records to prove it.

Q. Now, Mr. Dehne, was there anything else said about what you would do in the future insofar as selling alcohol was concerned?

(Testimony of Edgar Dehne.)

A. Yes, I had a conference with my other two clerks, and we decided which was the best way to curb, that is, if we could, after the warning from Mr. Cosgriff, and we decided not to sell to any body that looked like they were drinking it or we considered were dehorners.

Q. Did Mr. Cosgriff tell you there was any objection to selling rubbing alcohol to a normal person?

A. If I recall, Mr. Cosgriff said "Understand, Mr. Dehne, we cannot stop you from selling rubbing alcohol, but we can stop you selling it to dehorners."

Q. Now, did you talk to any one about how you should obey this regulation?

A. I believe I did; I consulted my attorney.

Q. What is his name?

A. Harry K. Jones.

Q. What did he tell you?

Mr. Brown: I object to that as hearsay.

The Court: Sustained.

Q. What did you ask him Mr. Dehne?

Mr. Brown: I object to that as hearsay.

The Court: Sustained.

Q. You said that you talked this matter over with your clerks. What did you instruct them, if you did?

A. Well, after we had this warning, had two warnings, [154] I think I asked "How are you

(Testimony of Edgar Dehne.)

fellows going to handle it? The way it looks to me, it is up to the individual who is selling it of how the man looks, whether he is a drunkard, or dehorner." And we all come to the conclusion the only way we could do was cut out those we thought were drinking it, or we thought were dehornerers.

Q. Did you follow that practice yourself?

A. Yes, sir.

Q. Do you still sell rubbing alcohol there?

A. No, sir.

Q. When did you stop selling it?

A. I think it was June 16th.

Q. That was done by you on your own behalf, or was it done on request of the government?

A. On my own behalf.

Q. You stated that you don't recall seeing two purchases made on March 9th, in the course of approximately an hour and a few minutes, which Mr. Johnson testified he made, and that also on the following day you don't recall the two purchases made in the course of about nine hours?

A. That is right.

Q. I will ask you to tell the jury whether or not you recall every customer that comes into the store to be waited on?

A. No, I don't. May I cite instances?

Q. No, just answer the questions. Do you recall the same man if he comes back two or three times a day?

(Testimony of Edgar Dehne.)

A. Not always; sometimes I do and sometimes I do not.

Q. That depends upon what?

A. Depends on how busy I am for one thing. Generally that is the big important reason. [155]

Q. Is there just one clerk on at a time, Mr. Dehne? A. Yes, sir.

Q. Mr. Dehne, have you, at my request, examined your records of the sales of alcohol at the United Cigar Store at Butte, Montana to determine whether or not there was any decrease in the sale of alcohol following January, 1929, over a period before that? A. I have.

Q. Tell the jury what you found from searching your records.

A. I found from January 1st. 1939, up to the time of the indictment that the alcohol sales were cut in my store seventy-five per cent.

Q. Over the previous time? A. Yes, sir.

Q. That was at the time you were warned?

A. Yes, sir.

Q. By these three gentlemen?

A. Yes, sir.

Cross Examination

By Mr. Brown

Q. You say you find since the 1st of January that your alcohol sales were cut seventy-five per cent, Mr. Dehne? A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. Now, is it not a fact that on the 5th of January of this year there was shipped to you by the corporate defendant from San Francisco, four hundred eighty pint bottles of rubbing alcohol?

A. That is right.

Q. And on January 17 of 1939, twelve days after that [156] there was again a shipment to you from the corporate defendant herein in San Francisco another four hundred eighty bottles of rubbing alcohol?

A. That is about right, as near as I can think.

Q. And that represented a decrease of seventy-five per cent of what you had been selling prior to that time?

A. No, up to the time of the indictment, up to June 16th.

Q. I understood you to tell your counsel, Mr. Dehne, that since the first of January that your sales had decreased seventy-five percent?

A. From January 1st to the time of the indictment, I believe it was June 16, my sales have decreased seventy-five per cent.

Q. Well, then, that four hundred eighty bottles that were shipped in January, and the four hundred eighty pints that were shipped again in January two weeks later represented a decrease from what had been shipped to you before, is that it?

A. I believe I put in an order before that of more than that. I haven't got the records here with me.

(Testimony of Edgar Dehne.)

Q. You don't have the records with you?

A. No, sir.

Q. Do you recall an order on November 10th for six hundred bottles? A. In 1938?

Q. That would be in November of 1938.

A. I recall, yes, a big order like that; I believe I did, but I don't know the date I ordered it.

Q. Now, you say you stopped the sale of rubbing alcohol completely on June 16, this year?

[157]

A. Yes.

Q. Do you recall the date that you were arrested? A. No, I don't.

Q. Well, the records on the warrant shows that it was on the 20th day of June. Does that refresh your recollection so that you can tell me?

A. Yes, I was arrested by this man (indicating).

Q. Would you say that that was right, the 20th of June? A. Yes, sir.

Q. So you ceased selling the alcohol one day after the indictment was returned and about four days before you were arrested? Is that true?

A. As near as I can figure; I can't remember dates that far back now.

Q. Now, this is a small store that you have there, is it not? A. Yes, sir.

Q. Only one clerk works in there at a time?

A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. Your chief articles of merchandise that you sell are tobacco and tobacco products, is that not true? A. That is the bulk of the sales.

Q. That is the bulk of the sales, cigars, cigarettes, pipe tobacco, and chewing gum, and, of course, pipes, and things to smoke? A. Yes.

Q. You don't sell drugs?

A. I don't know what would be listed as "drugs". I sell face lotions, and perfumes and shaving lotions, and bay rum [158] comes under that, and rubbing alcohol, and shaving soaps.

Q. Now, your customers are, in the great majority, men?

A. A lot of women trade, too.

Q. Would you say you have as much women trade as men? A. No, more men trade.

Q. You have considerably more men trade?

A. Yes, sir.

Q. Now, Mr. Dehne, did you have, between March and the first of May any stamp of the United States Government denoting that you or the corporate defendant had paid twenty-five dollars to permit retail liquor business to be done on the premises?

A. No, I didn't see any stamps around there.

Q. And did you yourself ever pay a tax or pay a license and receive a stamp which would permit you to conduct retail or wholesale liquor business?

A. No, sir.

(Testimony of Edgar Dehne.)

Q. And to your knowledge did the corporate defendant of which you are manager ever pay to the government any twenty-five dollars and receive therefor a retail liquor dealer's stamp permitting the corporate defendant to carry on a retail liquor business on the premises?

A. Not that I know of.

Q. No such stamp was ever displayed in the building?

A. Not in my store, no, sir.

Q. Now, you say that the officers of the government talked to you about the sale of this rubbing alcohol?

A. Yes, sir.

Q. Do you recall about June of 1938 Mr. Cosgriff, whom you know, came into your store and gave you the regulation [159] that had been adopted and explained to you the circumstances under which you could sell rubbing alcohol and what you could not?

A. Yes, sir. I have it right here in my pocket.

Q. May I have it?

(Witness hands counsel document.)

Mr. Brown: We offer in evidence, if the court please, Government's Exhibit 23.

Mr. Corette: No objection.

The Court: It will be admitted.

(Document marked Plaintiff's Exhibit 23, and is as follows: [160])

(Testimony of Edgar Dehne.)

PLAINTIFF'S EXHIBIT 23

(T. D. 4750)

Sales of Denatured Alcohol, Denatured Rum and
Articles

Treasury Department

Office of Commissioner of Internal Revenue

Washington, D. C.

To District Supervisors and Others Concerned:

Pursuant to the authority contained in Section 13 of Title III of the National Prohibition Act (U. S. C. 1934 ed., title 27, sec. 83) and Sections 2 (6) and 4 of Title I of the Liquor Law Repeal and Enforcement Act (U. S. C. 1934 ed., Sup. II, Title 27, Secs. 151 (6) and 153, respectively) Regulations No. 3 is amended by adding thereto, immediately preceding Article 147 thereof, a new Article to be known as "Article 146-A", reading as follows:

"Article 146-A. No person shall sell denatured alcohol, denatured rum, or any substance or preparation in the manufacture of which denatured alcohol or denatured rum is used, under circumstances from which he might reasonably deduce that it is the intention of the purchaser to produce the same for use for beverage purposes."

GUY T. HELVERING

Commissioner of Internal Revenue.

Approved: July 16, 1937

STEPHEN B. GIBBONS

Acting Secretary of the Treasury

(Testimony of Edgar Dehne.)

Q. Now, again, Mr. Dehne, about the second of January, do you recall Mr. Cosgriff coming into your store? A. I believe he did.

Q. And do you recall him telling you that he had received numerous complaints about the sale of alcohol from your store for beverage purposes, and giving you another warning?

A. He did, yes.

Q. And then again, on January 12, of 1939, or about that time, do you recall the three agents of the Government who have been here, coming in and again discussing the matter with you and giving you another warning? A. Yes, sir.

Q. And on January 2nd,—or about January 12th, your statement to them was that the corporate defendant sent this from San Francisco for you to sell, and as long as the company sent it you had to sell it. Is that right? A. Yes, sir.

Q. Was that the way you went about it?

A. I believe I told Mr. Cosgriff as long as the company sent it in here I was supposed to sell it. That is my bread and butter. [161]

Q. That is your bread and butter?

A. Yes, sir.

Q. And, of course, you work for the company?

A. Yes, sir.

Q. And they were, the companies themselves, were shipping this in to sell?

A. Yes, I ordered the stuff, tho.

Q. But they were directing you to sell it?

(Testimony of Edgar Dehne.)

A. Well, they don't tell you directly, but we have to sell everything that is sold that is on the shelf.

Q. As manager?

A. As manager that is my duty.

Q. As manager that was your duty?

A. Yes, sir.

Q. And you had to sell it if they continued on sending it in there to you?

A. Providing they give me notice that something was illegitimate to sell, or something, then I would have to quit selling it?

Q. Who gave you?

A. The company authorities.

Q. And your actions are controlled by the company authorities and not by the Internal Revenue authorities? A. Yes, sir.

Q. Now, Mr. Dehne, you stated that the week of March 1st, 1939 you had as your records show, customers in your store of three thousand two hundred sixty-eight?

A. Three thousand two hundred sixty-eight, yes, sir.

Q. And you have estimated that there were probably approximately another two hundred people came in and out of the store on each day which were not customers and which your [162] records do not show? A. Yes, sir.

Q. And there were only two men handling that amount of trade? A. That is right.

(Testimony of Edgar Dehne.)

Q. Each sale takes up some of your time, is that true?
A. That is true.

Q. You were probably exceedingly busy in handling that number of people in a week?

A. At times we were are crowded yes, and we were rushed.

Q. And all you could do is hear what the articles is and give it, and take the money?

A. That is right, without recognizing the person.

Q. With that number of customers you don't have much time to make observation of any particular person?

A. No, we don't. Not when we are rushed.

Q. And your attention is centered on making the sale and not on the individual that is coming in to purchase, is that true?

A. In a way, yes, sir.

Q. Now, of course, while it is probable you don't recognize every customer that might come in, you do recognize some particular customers who were there, either being strangers or physical appearance, or outstanding attitude?

A. Well, our regular customers we could generally recognize them, but what I call transients, a man coming in and out and not in there regularly. I would not recognize him.

Q. Don't you think if you had customers that came in there by reason of some physical defect

(Testimony of Edgar Dehne.)

or some distinguishing manner of talk, and that he was just beyond the ordinary run of [163] customers, that you could recall him if he came back again in an hour?

A. I might one time, and again I would not.

Q. Now, Mr. Johnson is a large man?

A. Yes, sir.

Q. He is larger than the ordinary run of men?

A. Many large men like him come in my store.

Q. He is a little larger than the ordinary run of men?

A. Yes, sir.

Q. And in addition to that he speaks with an accent?

A. I guess; maybe he does now, but it may be put on, a lot.

Q. But you know he does now?

A. The way I heard him yesterday he talked with an accent.

Q. If a man of his appearance came in the store and purchased rubbing alcohol from you at this time, and then an hour after that he came back again, don't you think you might recognize him?

A. No, sir.

Q. You don't think you would?

A. No, sir.

Redirect Examination

By Mr. Corette

Q. Mr. Dehne, of what type of people are most of your customers?

(Testimony of Edgar Dehne.)

A. Well, I would put them in the working class.

Q. And how are they dressed?

A. Well we have the big bulk of our trade is miners, that is fellows working in the mines. [164]

Q. Mr. Brown asked you about your statement to me as to the decrease in alcohol of seventy-five percent. I don't think it has been sufficiently clarified for the jury, and I will ask you again. Will you state to the jury whether or not there was a decrease in the sale of alcohol in your store from January, 1939 to June, 1939, over a period in 1938?

A. I believe there was.

Q. In other words, was there a decrease in 1939 from what you sold in 1938?

A. Yes, considerably.

Q. A considerable decrease? A. Yes.

Q. About how much?

A. I would say maybe seventy-five per cent.

Q. Now, you stated for Mr. Brown that you told Mr. Cosgriff, and that you told these three gentlemen when they came in, first, Mr. Cosgriff, I think, on January 2nd, and then the three men on January 12, that you would sell the alcohol if it was sent to you by the company. A. Yes, sir.

Q. Did you order the alcohol sent, or did they send it without order? A. I ordered it.

Q. What else did you tell these gentlemen that time, and Mr. Cosgriff, if you told them anything on January 2nd?

(Testimony of Edgar Dehne.)

A. I believe I told them we were doing the best we could, on this second warning, cutting out dehorners and drunkards.

Q. What do you mean by dehorners and drunkards?

A. My interpretation of it is a man who drinks this or who happens to be drunk and coming in the store to get it. [165]

Q. And you told these three men that you did that? A. Yes, sir.

Q. At the same time you told them you would sell it as long as it was sent to you?

A. Yes, sir.

Q. And did you do that? A. Yes, sir.

Q. Handing you Defendants' Exhibit 16, I will ask you if you recognize that? A. Yes.

Q. What is that?

A. Well, that is a paper in writing, showing——

Q. Signed by whom? A. By myself.

Q. In front of whom as a witness?

A. Mr. Cosgriff.

Q. How did it happen you signed this paper?

A. Well, he approached me and my first clerk, I think, and asked me if I would sign this paper to the effect that we were trying to decrease on some of our customers, or trying to cut down on those parties and selling it to what we considered were drunkards and dehorners.

Q. And you signed this paper?

A. Yes, sir.

(Testimony of Edgar Dehne.)

Q. And this paper is Defendants' Exhibit 16?

A. Yes, sir.

Recross Examination

By Mr. Brown

Q. Did you read it over before you signed it?

A. Hurriedly. I had to read that and wait on [166] customers at the same time.

Q. But you did read it before you signed it?

A. Yes, sir.

Q. And were the statements that you made in here true to the best of your knowledge and belief?

A. As far as I remember. I can't recall that word for word.

Q. Do you want to look over it?

A. If I read it now I can't remember how it read when I read it before.

Q. The question I am asking you, the time you read it before, did you know or believe that the things that were set out there were true?

A. Yes, sir.

Q. You were telling the truth, the paper contained the truth? A. Yes, sir.

Q. Now, Mr. Dehne, you had in this store window displays of alcohol? A. Yes, sir.

Q. Where did you get the forms for those displays? A. They are sent in by the company.

Q. And the company sends you in this diagram of displays of merchandise you should put in your window?

(Testimony of Edgar Dehne.)

A. Yes, in one window it is compulsory to put in the displays they send us, and in the other window it is up to the manager to display whatever he wants.

Q. You displayed the alcohol in the window?

A. Yes, sir.

Q. Did you display it in the compulsory window or [167] the discretionary window?

A. In both.

Q. You displayed it in both? A. Yes.

Witness excused.

Whereupon there was a recess had until Wednesday, November 15, 1939, until 2:00 o'clock p.m., at which time the trial of this case was resumed. [168]

WALFRED MAENPA,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. Will you please state your name?

A. Walfred Maenpa.

Q. What is your occupation, Mr. Maenpa?

A. Clerk.

Q. Where?

(Testimony of Walfred Maenpa.)

A. United Cigar Store, Broadway and Main, Butte, Montana.

Q. Do you reside in Butte? A. Yes, sir.

Q. What is your residence?

A. 114 South Dakota.

Q. How long have you been a resident of Butte, Mr. Maenpa? A. Thirty-nine years.

Q. How long have you been employed at the United Cigar Store? A. Four years.

Q. In what capacity? A. Clerk.

Q. Do you work every day?

A. I work two days a week.

Q. As relief clerk?

A. A relief clerk, yes.

Q. Mr. Maenpa, I don't believe you have been in court during all the case, or have you?

A. No, sir. [169]

Mr. Corette: Mr. Johnson, would you stand up? (Gentleman in audience arises.)

Q. Mr. Maenpa, were you employed by the United Cigar Store April 15, 1939?

A. Yes, sir.

Q. Did you work on that day?

A. Yes, sir.

Q. This gentleman (Mr. Johnson) testified that at about 9:15 a.m. on April 15, 1939, he went into the United Cigar Store at the corner of Broadway and Main, Butte, Montana, dressed in overalls, rough shirt and sweater, and purchased

(Testimony of Walfred Maenpa.)

from you one pint of rubbing alcohol, and at that time I think he stated in substance that he liked to drink it. Do you remember making such sale, or do you remember such person? A. No.

Q. Do you remember seeing this gentleman?

A. No.

Q. On April 15, the same date, at 10:15 a.m., this same gentleman, dressed in the same clothes, overalls, shirt and sweater, testified that he came into the store and purchased from you at that time four pints of rubbing alcohol, and that at that time he said in substance that the other hadn't lasted long; that four of them drank it. Do you remember making such a sale? A. No, sir.

Q. Do you remember this man coming in the store on that day at all? A. No, sir.

Q. At what price was rubbing alcohol sold in the United Cigar Store?

A. Fifteen cents a bottle. [170]

Q. Was it ever sold at any other price?

A. Yes, two for a quarter.

Q. Who is your employer; who employs you?

A. United Cigar.

Q. United Cigar Store and under whom do you work? A. Under Ed Dehne.

Q. That is Edgar Dehne sitting here?

A. Yes, sir.

Q. Did he ever give you any instructions as to selling alcohol? A. Yes, sir.

(Testimony of Walfred Maenpa.)

Q. What were those instructions?

A. Well, he said not to sell it to anybody that was intoxicated when he came in the store if we thought he drank it.

Q. Did he say anything else about it?

A. Well, he had been warned not to sell it to anybody who drinks it, and we talked it over to see what we would do about it.

Q. Did you follow that practice since that time?

A. Yes, sir.

Q. Do you remember when that was?

A. No, sir.

Q. Since that warning have you ever sold it to anybody you thought drank it? A. No, sir.

Q. Have you ever refused to sell any of this alcohol? A. Yes, sir.

Q. And for what reason?

A. Well, they were intoxicated, when they came in the store. [171]

Cross Examination

By Mr. Brown

Q. What brand of alcohol do you handle there?

A. Well the last I think was by the name of Wecol.

Witness excused. [172]

J. DAMON VIGEANT,

called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Davenport.

Q. Please state your name.

A. J. Damon Vigeant.

Q. Where do you live?

A. 401 Colorado, Apt. 23, Butte, Montana.

Q. What is your occupation?

A. At the present time I am laboratory assistant on the W. P. A. project at the Montana School of Mines.

Q. Do you know where the United Cigar Store is located in Butte, Montana?

A. Yes, sir, on the corner of Main and Broadway.

Q. Have you ever been in there?

A. Considerably.

Q. Have you been in that store since the first of the year, 1939? A. Quite a bit.

Q. Are you in any way connected with the United Cigar Store? A. None whatever.

Q. Could you state how many times you may have been in that store since the 1st of 1939?

A. Well, practically every day up until the last three or four months, two or three times a day.

Q. How long would you stay in the store while there?

(Testimony of J. Damon Vigeant.)

A. Anywhere from five minutes to two or three hours.

Q. Are you familiar with the articles they have on sale at that store? [173] A. I am.

Q. Do you know whether or not rubbing alcohol is for sale in that store? A. Yes, I do.

Q. Have you been present in the store when a sale of rubbing alcohol was made?

A. I have.

Q. Have you ever been in the store when a person came in to purchase rubbing alcohol and the sale was refused? A. I have.

Q. Can you state whether or not you know the circumstances under which the sale of rubbing alcohol was refused?

Mr. Brown: We object to that as incompetent, irrelevant and immaterial, and not having anything to do with the present issue.

The Court: Sustained.

Q. Can you state whether or not any such sales were refused while you were present in the store in the months of March or April of this year?

A. Yes, I can.

Q. Can you state the number, or approximate number of times, when such sales were refused?

Mr. Brown: Object to the question—

Mr. Davenport: I will withdraw the question.

Q. Can you state the number of sales which were refused at that time?

(Testimony of J. Damon Vigeant.)

A. I can't; quite a number that were refused, but I can't say any definite number.

Q. You cannot approximate the number?

A. No, I would not try that, but I have seen quite [174] a number of them.

Q. Were you in the store during the months of March and April? A. Yes, sir.

Q. How frequently were you in the store?

A. Well, I couldn't say. At that time it was part time, and practically all the time between periods of work I practically used that place as a loafing stand.

Cross Examination

By Mr. Brown.

Q. You were loafing inside the place?

A. Yes, sir.

Q. It is not a large place?

A. It is not a large place.

Q. Half a dozen people get in there it is pretty well crowded? A. It is.

Q. How long have you known Mr. Dehne?

A. I knew of him previous to 1929, but I only got to know him since 1936, when I returned to Butte.

Q. You are quite friendly with him?

A. Only in the store.

Q. Well, how did he come to know about you as a witness in this case? Have you any particular friendship for him?

A. He asked me if I remembered seeing him refuse any sales, and asked if I would act as a witness for him if I was called.

Q. And you said you would?

A. I did.

Q. And talked over your testimony with him?

[175]

A. No, sir.

Q. Well, you did to him?

A. Well, he asked me if I would testify about the incident of how many sales were refused, and all that.

Q. What date in March did you see them refused? A. I couldn't say.

Q. The 1st of March?

A. Well, it might have been and might have been the last. My period of work was between the 11th and 25th.

Q. But you cannot tell any date?

A. I couldn't say, I never paid any attention to it.

Q. Who were the persons in March he refused to sell to? Name them.

A. I didn't get that.

Q. Name the person or persons he refused to sell to. A. I couldn't give that either.

Q. What day in April did you see this?

A. Sometime in April, along some time during the time I wasn't working.

(Testimony of J. Damon Vigeant.)

Q. Are you particularly interested in the way he was carrying on business there?

A. No, not particularly interested.

Witness excused. [176]

CHARLEY A. DAVIES,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Davenport

Q. Will you please state your name?

A. Charley A. Davies.

Q. And where do you live?

A. I live in the Clark Block.

Q. In what city? A. City of Butte.

Q. Where are you employed?

A. Montana Power Company at the present.

Q. In what capacity?

A. You might call it bookkeeping.

Q. Are you acquainted with the location of the United Cigar Store in Butte, Montana?

A. Yes, the southeast corner of Broadway and Main.

Q. Have you ever had occasion to go in that store? A. Yes, sir.

Q. Are you acquainted with the type of merchandise handled in that store? A. Yes, sir.

(Testimony of Charley A. Davies.)

Q. Will you state whether or not rubbing alcohol is offered for sale by that store?

A. Yes, sir.

Q. Have you had occasion to go into the United Cigar Store between the first of January of this year and April 15th of this year?

A. I have been in there almost every day. I buy cigars five or ten at a time, and I go in there almost every day. [177]

Q. Have you been in there during that period of time more than once a day?

A. Sometimes, almost every time I pass.

Q. How long do you stay in the store on these occasions?

A. Might be anywhere from five minutes to thirty maybe, or an hour. Just depending on how much time I had to waste.

Q. Calling your attention particularly to the months of March and April of this year, did you, during that time, ever see one of the clerks in that store selling rubbing alcohol or making a sale of rubbing alcohol?

A. That would be hard for me to state, I couldn't state exactly the month.

Q. Could you state whether or not during that particular time you ever saw one of the clerks in that store make a refusal of a sale of alcohol?

A. I have seen them several times make a refusal of the sale of alcohol, rubbing alcohol.

(Testimony of Charley A. Davies.)

Mr. Brown: We move to strike out the testimony of the witness as not an answer to the question. He asked him during those months.

The Court: The answer will be stricken.

Q. Could you state, whether or not, during the time between January 1st and April 15th you saw one of the clerks, or any of the clerks in that store refuse to sell rubbing alcohol?

Mr. Brown: Object to that as the indictment is between March and the 15th of April.

The Court: Overruled.

A. I couldn't be positive as to dates. I won't [178] testify to any date.

Witness excused. [179]

FRANK SULLIVAN,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. Please state your name.

A. Frank Sullivan.

Q. What is your occupation?

A. Bookkeeper, accountant.

Q. Where are you employed at the present time?

A. Montana Welfare Board.

(Testimony of Frank Sullivan.)

Q. You live in Butte? A. Yes, sir.

Q. For how many years?

A. Forty-seven years.

Q. Are you acquainted with the location of the United Cigar Store in Butte? A. Yes, sir.

Q. Where is it? A. Broadway and Main.

Q. Do you know what products they handle?

A. They sell cigars and cigarettes and candies.

Q. State whether or not they handle rubbing alcohol? A. Yes, sir.

Q. During the month of April and during the month of March, 1939, were you ever in that store?

A. Yes, sir.

Q. About how often?

A. Approximately at least five days a week.

Q. For what purpose were you in there?

A. Sometimes to purchase something, and other times I [180] stopped to kill a little time before going to work or after coming from work.

Q. Has that been your habit over a period of time?

A. It has been for the last three or four years, last three years, I would say.

Q. During the months of March and April, 1939, were you ever present when any of the clerks refused to sell rubbing alcohol?

A. Well, I would say I have been.

A. Could you approximate the number of times?

A. No, I couldn't, nothing definitely.

(Testimony of Frank Sullivan.)

Cross Examination

By Mr. Brown.

Q. In answer to that question your answer was "Well, I would say I have been." Now why did you answer that way?

A. To what particular question?

Q. The question that Mr. Corette asked you, that is, as to whether in March and April you were present in the store and saw any of the clerks refuse to sell rubbing alcohol, and you answered in the manner I have indicated.

A. What did I say?

Q. Your answer was— You didn't say yes; you said "Well, I will say I have been". Why did you use that expression?

A. Well, because, to the best of my own knowledge I have been in there when they refused it at least once a week for every month since the first of the year.

The Court: You must answer the question. The question is confined to March and April of this year.

Mr. Brown: I move to strike that out.

The Court: It is immaterial what you saw before [181] March 1st or after April 15th.

The Witness: Well, I would say yes, I have been there.

The Court: Now, he wants to know why you didn't say "Yes" or "No"; why you did say "I would say".

(Testimony of Frank Sullivan.)

The Witness: Yes.

Q. (By Mr. Brown) I want to know why, instead of answering the question "Yes" your answer was "Well, I would say yes".

A. Well, it was just my method of answering the question.

Q. Is it not a fact that it is because you don't know whether it was any time you were in there in March or in April, and you never saw them refuse a sale to anybody?

A. No, it is not a fact.

Q. What is the fact?

A. The fact is I have seen them refuse to sell in the month of March and April.

Q. What time in March?

A. I couldn't state any particular date.

Q. What?

A. I have been there at least five days a week and didn't keep an account of the particular date when somebody was refused. It seemed to be quite a habit to turn down people when they were intoxicated.

Q. I didn't ask you about a habit. Why do you insist on volunteering answers to questions that I didn't ask you about?

Mr. Corette: Objected to as incompetent, irrelevant and immaterial, and argumentative.

The Court: Overruled. [182]

Q. Why do you insist on volunteering information here that I have not inquired of and in not answering the question I asked you?

(Testimony of Frank Sullivan.)

A. No reason at all; just merely to make my answer plain and clear about the way I want to answer it.

Q. The reason is you came up here to tell a story and you are going to tell it whether you are asked the question or not?

A. No, I did not; I came up to tell the truth.

Q. Tell me what day in March you were in there and saw this.

A. I couldn't tell a particular day.

Q. Why not?

A. Because I never took any trouble to memorize the day that I have seen those occurrences. You never do memorize a date.

Q. How do you know it was in March.

A. Well, it has been as I said——

Q. Now just answer the question and not as you said. Just answer the question. How do you know it was in March, if you didn't take the trouble to remember the date?

A. As my memory serves me, that is what it is.

Q. What?

A. As my memory serves me and to the best of my recollection.

Q. You were not asked as to the best of your recollection. You were asked to state whether you know that or not.

A. I said yes.

Q. When you said "Yes", when do you mean?

A. That I could state it was in March. [183]

Q. You were in there on every day?

(Testimony of Frank Sullivan.)

A. Yes, sir.

Q. And January? A. Yes, sir.

Q. And December? A. Yes, sir.

Q. And you have been in there from then to June and July? A. Yes, sir.

Q. Were you particularly interested in the way business was being carried on in the rubbing alcohol in that store? A. No, sir.

Q. In March and April did you see them selling rubbing alcohol to people in there?

A. Yes, sir.

Q. You saw that too? A. Yes, sir.

Redirect Examination

By Mr. Corette:

Q. These people that you have testified to seeing clerks turn down for the sale of alcohol, do you know why they turned them down?

Mr. Brown: I object to that as calling for a conclusion of the witness.

The Court: You are asking for the state of another man's mind. He is not qualified to determine that. Sustained.

Q. Your testimony shows, Mr. Sullivan, that you stated that they turned down sales of alcohol to persons who were intoxicated. Do you know whether they ever turned down any other persons during the months of March and April? [184]

The Court: The question is did you see them?

Q. Did you see them turn down any other persons? A. Well, I wouldn't say to that.

Witness excused. [185]

CYRIL VARCOE,

called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. Please state your name.

A. Cyril Varcoe.

Q. And where do you reside?

A. 1036 Iowa Avenue.

Q. How long have you lived in Butte?

A. Twenty-one years.

Q. Still residing in Butte?

A. Yes, sir.

Q. Where are you employed?

A. United Cigar Store.

Q. In what capacity? A. Clerk.

Q. In your capacity as clerk, how many years have you been employed there?

A. Going on twelve years.

Q. Prior to that time were you employed at the United Cigar Store? A. No, sir.

Q. Employed there continuously twelve years?

A. Going on twelve years, yes, sir.

Q. Do you work every day of the week?

A. No, we have one day off a week.

Q. And the other days, how do you work, how many hours?

A. A long shift one day and a short the next. I think it is ten hours one day and six the next.

[186]

Q. And the other two clerks in the store, what are their names?

(Testimony of Cyril Varcoe.)

A. Edgar Dehne and Walfred Maenpa, the relief man.

Q. Are there any others? A. No.

Q. Do two work at a time, or one?

A. Just one at a time.

Q. And the other man comes and takes his place? A. That is right.

Q. Have you ever seen this gentleman before (indicating gentleman in court room)?

A. Not to my knowledge.

Q. Were you employed in the United Cigar Store on March 9th and 10th, 1939?

A. Yes, sir.

Q. Were you employed there?

A. Yes, sir.

Q. On March 9th of this year, were you working there?

A. Unless it was my day off. I don't remember the date I was working.

Q. Have you examined the records to determine whether you were employed on March 9, 1939?

A. I believe that was one day I was working.

Q. Have you examined the records to determine whether or not you were employed on March 10, 1939?

A. Yes, I believe I looked that over and I was working.

The Court: Do you mean by "employed" actually at work?

Q. Yes, actually at work in the store? [187]

(Testimony of Cyril Varcoe.)

A. Yes, I believe the record shows I was working those two days.

Q. And you worked your full shift those two days? A. Yes, sir.

Q. This gentleman who stood up over here, has testified that on March 9th, at 7:25 p. m., he went into the United Cigar Store at the corner of Broadway and Main Streets, dressed in overalls, rough shirt and sweater, and purchased one pint of alcohol from you. Do you remember making that sale?

A. No, sir. I do not.

Q. He has also testified that on March 9th, at 8:25 p. m. he went into the United Cigar Store at the corner of Broadway and Main Streets, dressed in overalls, rough shirt, and sweater, and purchased one pint of alcohol from you. Do you remember making that sale? A. No, sir, I don't.

Q. And he has also testified that on March 10th at approximately 12:20 p.m. he went into the United Cigar Store at the corner of Broadway and Main, and was dressed in overalls, rough shirt and sweater, and purchased one pint of alcohol from you. Do you remember making that sale?

A. No, sir. I don't.

Q. He has also testified that he went into the United Cigar Store at the corner of Broadway and Main Streets, on March 10th at 5:05 p. m., or approximately that time, dressed in overalls, rough shirt, and sweater, and purchased one pint of rub-

(Testimony of Cyril Varcoe.)

bing alcohol from you. Do you remember making that sale? A. No, sir. I don't.

Q. Do you recall having a conversation with Mr. Cosgriff in the month of January of this year?

[188]

A. Yes, sir, I do.

Q. Will you relate to the jury just what that conversation was?

A. As near as I can remember,—I couldn't figure word for word, but he just told us to discontinue the sale of alcohol to fellows we were in doubt or in regards to what they were using the alcohol for.

Q. Do you remember about what time that was?

A. No, I couldn't give you the date; it was around the 1st of the year, I would say January month.

Q. You said: "told us". Who do you mean by "us"?

A. Well, told me. I beg your pardon. Scratch that out.

Q. Following that, what was your practice in the sale of alcohol? What did you do?

A. We talked it over among ourselves and decided not to sell it who we figured were using it for illegitimate purposes.

Q. Who do you mean you talked it over with?

A. The relief man, and Mr. Dehne.

Q. The relief man was who?

A. Mr. Maenpa.

(Testimony of Cyril Varcoe.)

Q. From that time on, what was your practice of selling rubbing alcohol?

A. Very limited, and to such an extent that I got the name of "cold eye" from them, and then, using a bad name along with it.

Q. During the time from January 1st, 1939, the first of the year, 1939, until about April 15, 1939, did you sell to any one that asked to purchase rubbing alcohol? [189]

A. Did I sell?

Q. Did you sell to every one who asked to buy rubbing alcohol?

A. No.

Q. Whom didn't you sell to?

A. I tried to discriminate between the ones using it for legitimate and those using it for illegitimate.

Q. What do you mean?

A. If they looked like they mean to drink it, or make you hesitate according to the way they acted, or a smell on the breath and a hard look in their faces, I would turn them down. If they come in sober and looked all right to me, I would sell it to them.

Q. Showing you Defendants' Exhibit 17, I will ask you if you recall what that is?

A. Yes, sir. That is the copy Mr. Cosgriff gave me in regards to alcohol and explained from then on we were to discontinue the sale of it to anybody we were in doubt of.

Q. What is this Defendants' Exhibit 17?

A. It is a statement here from then on we would curb our sale of alcohol.

(Testimony of Cyril Varcoe.)

Q. Is that your signature? A. Yes, sir.

Q. And you signed it in front of Mr. Cosgriff?

A. Yes, sir, and Mr. Denneen.

Q. Do you recognize Mr. Denneen?

A. Yes, sir.

Q. Point him out.

A. He is the gentleman back there, the gentleman with glasses and with a red necktie. [190]

Q. This statement was made by you for Mr. Cosgriff? A. That is right.

Q. What was the selling price of this alcohol?

A. Fifteen cents toward last; two for a quarter when it first came in.

Q. Do you know approximately how many customers you had in the store a day?

A. Between four and five hundred.

Q. When I use the word "customers" and you answer that many customers, do you mean purchasers or people who just come in the store?

A. That many ring-ups on the register, cash customers.

Q. How many were in the store who didn't buy anything? A. One to two hundred a day.

Q. What are these people who didn't buy anything going in your store for?

A. Asking information for different parts of town, asking for stamps, or looking for a pack of matches, or asking for the price of different stuff in the store, prices of the stuff in the window.

(Testimony of Cyril Varcoe.)

Q. Can you tell the jury, what, in your opinion, is the general type of person that patronizes the store, the average person that patronizes your store.

A. It is the average working man.

Q. By "working man" whom do you refer to?

A. The average man on the hill like the miner or the W.P.A. man; the average man with overalls and jumper and sweater.

Q. Do you also have other customers, besides that? A. Yes, sir. A lot of them. [191]

Cross Examination

By Mr. Brown:

Q. But you sell to anybody that comes in don't you? A. Yes, sir.

Q. And you say that you have more customers who are working men than people who are not working men?

A. More of the working men come in there than the better dressed men, yes, sir.

Q. Miners on the hill and other men like that?

A. That is the idea, yes, sir.

Q. Of course, there are more of those in town than anybody else, aren't there? A. Yes.

Q. Now, you said Mr. Cosgriff, that you had a talk with Mr. Cosgriff, and he gave you a warning, is that right? A. That is right.

Q. When was that?

A. Around the first of the year.

Q. And you said that after that you changed

(Testimony of Cyril Varcoe.)

your practice in the store with reference to handling rubbing alcohol? Is that right?

A. Yes, sir. We did.

Q. Well, in what respect did you change your practice?

A. Lots of customers come in where they might be drinking it, or supposed they were, or looked like they were using it for anything but legitimate purposes, we would turn them down by telling them we didn't have any in the store.

Q. Prior to that warning, the people that came in there that looked like they had been drinking it, or wanted to drink it, or were not going to use it for legitimate purposes, you would sell [192] it to them, is that true? A. Yes, sir.

Mr. Corette: We object to any testimony with reference to selling it prior to January of 1939, for the reason it is incompetent, irrelevant and immaterial, and beyond the issues of the case, beyond the period when anything can be proved, and beyond the period of March and April, as set forth in the indictment.

The Court: As I recall you introduced a statement said to have been signed by this witness.

Mr. Corette: That is correct.

The Court: In which he said that they changed their practice. Well, counsel has a right to broaden on it and carry thru. Overruled.

Q. Now, you said after that that you tried to sell, that you now tried to sell to only the people you felt used it for legitimate purposes?

(Testimony of Cyril Varcoe.)

A. Yes, sir.

Q. Now, Mr. Varcoe, if a man came in to you, bought a pint of rubbing alcohol from you, and an hour after that the same man came back and bought another pint from you, and that another hour after that the same man came back and bought another pint from you, would you consider that man was using that for a legitimate purpose and make the sale to him?

Mr. Corette: The question assumes facts not in evidence; assumes three purchases from the same clerk; no evidence being introduced as to three purchases from the same clerk, and therefore, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Corette: Exception, please. [193]

The Court: The exception will be noted.

Q. Do you have the question in mind?

(Question read)

A. Yes, sir. I would. I bought six myself in one afternoon, and I could see how that would be all right. If the gentleman came in each time sober and without anything smelling on his breath.

Q. Without asking him any questions what he wanted it for, and what he was doing with it and why he was buying alcohol of that kind, you would still make the sale?

A. Yes. I don't figure it was any of my business, if the gentleman came in dressed up.

Witness excused.

Mr. Corette: The defendants rest. I wonder if it would be understood that the motion which was made at the end of plaintiff's case could be considered made at the present time?

The Court: It will be considered as made and denied.

Mr. Corette: Exception, please.

The Court: The exception will be noted.

The foregoing is all of the testimony and evidence introduced upon trial of this cause.

Thereupon, and after argument of counsel for the respective parties, the court instructed the jury as follows, to-wit:

The Court: Gentlemen of the Jury, it now becomes my duty to charge you as to the law of the case. At the outset, I [194] wish to call your attention to the fact that you and I are both officers of this court. Each of us has a separate and distinct function to perform. It is my duty, presiding here as I do, to confine the trial of the case, within legal limits, and give you the law that controls your decision. I have nothing whatever to do with fact questions. On the other hand, you, as the other arm of the court, have nothing whatever to do with the legal phase. Your sole function, and it is an important function, is to decide the fact questions. With that I have nothing to do. That is the necessary result of the oath you took when you entered upon the trial of the case, and that oath is "that you do solemnly swear that you will well and truly try the case and a true verdict rendered according

to law, as given by the court and the evidence, so help me God." So you see, Gentlemen, that the decision is controlled by the law and the evidence, and in determining what that decision may be, you have no right to consider any sympathy that you may have for any individual involved or any one relating to or dependent upon him. It is a cold question to be decided upon two things. I can fairly say, that I have the sympathy that I believe you have for every man that comes here for trial; it is natural. In my opinion, it is not a subject of criticism, but as officers, we must lay aside our feelings as men. It is unfortunate that men will violate the law; it may be unfortunate that they are caught, but the fact remains, that if they have violated the law and are caught, the people of this country, that is, you and I, have said they shall be punished; and the people of this country said thru Congress, that is just you and I and people like us, have said that in arriving at your verdict you shall have no right to consider any human sympathy you have, but that you must decide the case [195] according to law as given by the court to you and the facts.

In the indictment in this case, twenty-two separate and distinct offenses are charged. Each of these is a separate violation of a different law, all intended for the protection of the government and the individual. In the first count it is charged that the defendants carried on the business of a retail liquor dealer without having paid the fee required by law, or retail liquor dealers' license. In counts

two to eleven, it is charged that the defendants did sell intoxicating liquor for beverage purposes. In counts twelve to twenty-one it is charged that the defendants sold denatured alcohol in containers which did not have the stamps required by law upon them. And, finally, it is charged in count twenty-two that the defendants did have in their possession, knowingly, a quantity of denatured alcohol, with intent to use it in violation of law. But this indictment is not proof of anything, and it must not be considered by you as proving or tending to prove the truth of any statement contained in it. It is merely a formal charge required by law to be filed in court for a number of purposes, first, to set the power of the court in motion; as you know, under the constitution, where a man is charged with a federal offense of the grade of offense charged here, he cannot be put on trial and the court cannot move, except on an indictment returned by at least twelve men. So, in that sense the indictment is the foundation upon which the power of the court in this case rests. The indictment is required under the law to be of a kind and character that will inform the defendant of the charge that he is called upon to meet. The constitution of the United States provides that no man shall be put upon trial in a case of this kind except upon indictment by a grand jury. It requires [196] that that indictment shall inform him of the nature of the charge made against him so that he may come here prepared to meet the issue and try his case

and defend himself against the charge made. Another purpose of the indictment is to inform the court of the facts as they are alleged, so that the court may here, taking these statements to be true, whether a Federal offense is charged in the indictment; and the final purpose of the indictment is to inform you, as jurors, of the exact questions that you are called upon to determine. So bear in mind, gentlemen, that the indictment has no weight or effect in evidence, and it must not be considered by you as in any way proving or tending to prove the truth of any statement contained in it, or that the defendant is guilty of the charges that are made. Also, bear in mind that in arriving at your verdict in this case you must not consider the fact that the defendants are here on trial as proof that they, or either of them is guilty. The fact that they are here, from the standpoint of proof, means exactly nothing.

In this case, if either defendant is guilty of any charge made in the indictment, both are guilty. The defendant corporation, is, under the proof here, liable civilly and criminally for any act that was done by the defendant Dehne, or any one acting under him while employed by defendant. So there can be no splitting of a verdict there. If the corporate defendant is guilty, that guilt arises out of and is based on the fact that the individual defendant Dehne is guilty. His act is their act. If he committed no crime, they committed none. How-

ever, in determining whether he or they did commit one or more of the offenses charged in the information here, you have a right to consider what was done by [197] each. There seems to be no controversy here upon what was done, however, all fact questions are for you, but as I recall it is admitted, that Dehne was the manager of the store here in Butte for the defendant corporation; that they shipped to him at his request the articles in evidence, and other similar articles, which all agree, or which no one appears to controvert at all, is rubbing alcohol; that the defendant Dehne, upon receipt of that alcohol, did sell it himself, and others by his direction in the place of business maintained by the defendant corporation, and of which he was manager. So, every act that he did was the act of the corporation; every act of the clerks employed by him in the establishment here was his act, and the act of the defendant company. So, as I say, both are guilty, or neither is guilty.

Turning to the first count of the indictment, the essential things charged are that beginning on or about the 9th day of March, 1939, and continuing until on or about April 15th, 1939, at 39 North Main Street, in Silver Bow County, Montana, the United Cigar-Whelan Stores Corporation, a Delaware corporation, and the defendant Dehne did carry on the business of a retail liquor dealer and willfully failed to pay the special tax imposed by law. The Federal law requires that any one carrying on the business of a retail liquor dealer, that is, who is selling in

containers of less than one gallon capacity, any intoxicating liquor for beverage purposes, that is to be drunk, shall pay a license tax. The law requires that that tax shall be paid on or before a specified date each year, after the business is begun, and upon the payment of the tax the government shall deliver to the person paying a receipt showing that the tax has been paid, and that receipt or evidence of it must be posted in the place where the business is carried on in a most conspicuous place. As [198] I gather it here, there is no reasonable ground for controversy that the tax was not paid by the defendants or by the corporation or by the defendant Dehne. Neither is it contended, apparently, by Mr. Dehne, or by his corporation employer, that there was a retail liquor dealer's stamp posted any place in the location involved in these transactions or in this indictment.

This count of the indictment is based upon a regulation issued by authority of law, which provides that no person shall sell denatured alcohol—there is no question, apparently, here that the article sold, and it is admitted it was sold, is denatured alcohol—under circumstances from which it might reasonably be deduced that it is the intention of the purchaser to procure the same for use for beverage purposes.

Now, the law upon that subject is this, as soon as, or before, one can commence producing alcohol, he must go to the government and tell it under oath

that he intends to operate in that way. He must tell it, also under oath, where he intends to carry on his operation, what size stills he intends to use; between what hours he intends to carry on the distillation and so on. He is also required at that time to furnish a bond to the government to pay any taxes that may become due because of the operation that he intends to carry on. These requirements are based on certain reasons. The first reason is, that the government knowing that alcohol may or may not result in harm to mankind, is interested in having it produced under sanitary and proper conditions. In order that it may do that, it must know when, where, and by whom the operation is going to be carried on, so that these operations may be carried on under government supervision. To carry on its work in protecting humanity against unfit products, the government, of course, is required to pay [199] your money and mine. That money can only be secured by a tax on the article which is produced for sale and sold. So the government says to one who wishes to register his still that you should give a bond that you will pay the tax that will become due on the product of your distillation. Upon giving that bond, and the registering of the still, the party has a right to proceed under government supervision to carry on the process necessary to distillation of alcoholic liquors. The moment that the liquor comes into existence it is subject to a tax, which the distiller is required to pay upon its removal from the bonded warehouse where it may

be stored, or from the distillery in which it is made. And that tax and its payment is secured by the bond that the distiller gives. If that product is put upon the market for beverage purposes, it pays a tax of \$2.65 a gallon. That is the tax upon it, and that tax is paid upon it when it is removed from the bonded warehouse or still for the purpose of being put in the channels of commerce. Now, that applies to all that is produced. The tax is assessed the moment it comes into being. It is due the moment that it is withdrawn from the still house, or bonded warehouse and put in the channels of commerce for use for beverage purposes. However, under the law it is not required that the tax be paid, as I say, until it is withdrawn for use for beverage purposes. While the alcohol is in the bonded warehouse, or in the still where it is produced, or stillery, the tax need not be paid; it is lying idle, and under certain conditions it may be withdrawn for certain purposes without the payment of any tax. The tax, as I told you, always fixes and continues when it is withdrawn for use for beverage purposes, and it is paid upon its withdrawal. Also, it is provided by law that one carrying on certain other enterprises may get [200] that liquor from the bonded warehouse, or the still, or the distillery, without paying any tax, provided that the distilled spirits is intended for use for mechanical business other than beverage purposes, or for use in the preparation of medicinal preparations. So, the person getting the alcohol, or the distilled spirits that is contained

in the various exhibits here, had a right to withdraw or secure the withdrawal of the alcohol contents of these bottles from the distillery or bonded warehouse without the payment of any tax at all and to use it for the preparation of denatured alcohol, which was not to be used for beverage purposes. Whether the withdrawer or the one who made the distilled spirits intended to convert it by the addition of other substances into a state known as denatured alcohol, they would still have to pay a tax required by law upon every gallon of it, if they intended to sell it for beverage purposes. No tax where it was sold, or intended for the intended use of medicine only. There is the marking point or parting point at which the tax is required to be paid and the point where it is not required to be paid. If the alcohol is withdrawn from the distillery, is denatured and is sold for use for medicinal purposes, it is subject to no tax. On the other hand, if it is withdrawn from the still, as I have told you, if withdrawn to be denatured, they are not required to pay the tax upon its withdrawal, but if they do withdraw it without paying the tax and then denature it by the addition of other substances supposed to make it unpleasant to drink, and it is only used for medical purposes, there is no tax; but, under this rule or regulation, and under the law as it is written, if it is sold under circumstances from which it might reasonably be deduced that it is the intention of the purchaser to procure the same for

use for beverage purposes, the tax immediately fixes and [201] it is the duty of the person possessing it, as well as the duty of the person selling it under those conditions to pay the government the tax that should have been paid on the liquor when it was withdrawn from the still or bonded warehouse. And, if the article, tho it be denatured alcohol, is sold under circumstances such as to cause one to reasonably deduce or to believe that it is the intention of the purchaser to use it for beverage purposes, the person who sells it, tho he is the operator of a cigar store, is, in fact, and in law, a retail liquor dealer and is required to pay the tax which Congress has said one engaged in business of that kind shall pay. So that covers the first count.

The second count, and I believe the other counts down to number eleven, inclusive, charges the sale of this denatured alcohol. There is no question it is denatured alcohol, nobody doubts it. That is an admitted fact in the case, as I understand it. The question is, was the sale of this article for beverage purposes. If it was sold for beverage purposes, it was the duty of the person selling it to pay the tax that should have been paid on it if it were withdrawn for that purpose, at the time it was taken from the bonded warehouse or still, that is as I recall it, \$2.65 a gallon. If he didn't make that payment, or the tax, there was a violation of the statute of the United States. We have a little different situation with reference to all the other counts,

except the last, and that is in some ten of these counts, it is charged that the defendant did sell this liquor for beverage purposes, or under circumstances which would reasonably lead to the conclusion that the buyer intended to use it for that purpose, in containers which did not have upon them the revenue stamp required by law to be put upon liquor intended to be sold for beverage purposes. Now, there is no doubt about that. The exhibits [202] are here. There is no stamp on them. Nobody contends that there is or ever has been. The question in these counts is, were these articles sold under conditions which would cause one reasonably to deduce, or reasonably to believe, that the purchaser intended to use the article for beverage purposes. These stamps are required by law to be placed upon the container of the liquor intended to be sold for beverage purposes. Those stamps are known as strip stamps, and they are placed in such a way that the opening of the container will necessarily destroy the stamp so that it cannot be re-used. That stamp is required to contain statements denoting the quantity of the article contained in the container upon which it is affixed, and evidencing the payment of the Internal Revenue tax imposed upon the article.

I pointed out the legal steps that must be taken for the distillation of the article, all done under government supervision, under sanitary conditions, and by the use of proper materials, then, as a final

step, when the article is withdrawn to be put in the channels of commerce for use as a beverage, the law requires that the stamp shall be put upon it. The stamp is required to show two things, the quantity that the container has in it, and that the tax has been paid. It serves a double purpose: the buyer knows that he is not required to pay the tax on the article that he gets, and the buyer who gets the article also knows the quantity of the article that he is buying, that is contained in that container. That is intended for the protection of the buyer.

As I have said, the defendant would have a right to sell denatured alcohol for medicinal purposes without the payment of any tax, but, if he saw fit, that is the defendant Dehne, acting as agent of the defendant [203] company, to divert that alcohol, denatured, from the usual course that is for use for medicinal purposes, and sell it under conditions which would reasonably cause the average man to believe that the article was intended by the buyer to be used for beverage purposes, then to sell it without the strip stamp on it was a violation of the Federal law.

Finally, in the twenty-second count, it is charged that on or about the 15th day of April, 1939, at 34 North Main Street, in Butte, Montana, the defendants did knowingly possess a quantity of an article known as Wecol in the manufacture of which denatured alcohol was used, with the intention to use it in violation of a regulation issued under Title III

of the National Prohibition Act, pertaining to and forbidding the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which said defendants, and each of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes. In other words, the first count is based upon a failure to pay the retail liquor dealer's license tax; the next ten counts are based upon a sale of denatured alcohol for beverage purposes; the next ten counts are based upon a sale of denatured alcohol for beverage purposes in a container which was not stamped as the law requires. The twenty-second, and final count, is based upon the possession of the article with intent to sell it under circumstances which would cause one to reasonably deduce that it was the intention of the purchaser to procure the article for use for beverage purposes.

As I have told you, the indictment does not prove anything. The fact that the the defendant is on trial must not be used against him.

We now come to the burden of proof and the degree [204] of proof required before a conviction may be had in this case. By his plea of not guilty, the defendant has put the burden upon the government of proving the truth of the statements contained in this indictment. Don't misunderstand me: it is not necessary for the government to produce proof to satisfy you of the truth of each and all of

the counts set forth in the indictment before a conviction may be had. If the government's proof is sufficient, you may find the defendant guilty on all counts. If the government has failed to prove, to the degree of certainty required by law, the existence or the truth of the statements contained in any of the counts, it is your duty to find a verdict of not guilty as to all counts. On the other hand, if the government has produced here proof which satisfies your minds to the degree of certainty required by law of the truth of the statements contained in some of the counts, and has failed to prove to your satisfaction, or to that degree of proof which the laws requires the truth of the statements contained in other counts, you will find the defendant guilty of the counts which are proved, and you will find them not guilty in the counts which are not proved to your satisfaction.

In other words, you have a right to determine all the counts by one general verdict. If you believe that some of the counts have been proven and other have not, it is your duty, under your oath, to find the defendant guilty on the counts you believe have been proven, and not guilty on the counts you believe have not been proven.

With reference to proof: at the commencement of the trial the defendant comes into court, surrounded and protected by the presumption of innocence. In other words, he comes into court in the beginning presumed to be innocent. Most of us do [205] not commit criminal offenses, so the govern-

ment starts at that point, and says that when a man is charged with a public offense, it will be presumed at the outset that he is like the rest of us, he has not done anything which the law says he shall not do, but he shall be punished if he does it. This presumption of innocence has the weight and effect of evidence. It comes into court with the defendant, and it proceeds with him thru every step of the trial, and it goes with you into the jury room with you, and there it protects the defendant against a verdict of guilty unless, and until, it is overcome by proof which satisfies your minds of his guilt as charged beyond a reasonable doubt. The presumption of innocence goes with you into the jury room. You start with that presumption. You continue to find according to the presumption that the defendants are, and each of them is innocent of the offenses charged, or any of them, unless and until you are satisfied from the evidence in the case that the presumption is wrong and that the truth of the charges made in the indictment has been proven beyond a reasonable doubt. You will note I do not say "beyond all doubt". I do not say "beyond possibility of error", but I do say that the guilt of the defendant must be proven beyond a reasonable doubt. The word "reasonable doubt" is rather hard of definition. However, the law requires that I shall define it to you and try to make it clearer than the words themselves do. The Supreme Court has defined a "reasonable doubt" as a doubt which is based on reason. So, in determining whether or not the government

has borne its burden of proving its case beyond a reasonable doubt, you ask yourself "is the doubt, or is there a reason which I can state, which would cause me to believe that the defendant is innocent." The Supreme Court has also said that a reasonable doubt is a doubt which is based on reason and [206] which is reasonable in view of all; of the circumstances of the case. So, in considering whether the presumption of innocence is overcome, you consider all the facts and circumstances in the case as they appear from proof here and conditions under which the articles involved in these transactions were secured, the manner of its use after it came into the hands of defendant Dehne, as manager of the defendant corporation, retail store, at 34 North Main Street; and in that connection you take into consideration the fact, if it be a fact, that conditions were carried on in the store thru the manager. A corporation acts thru those representing it.

In determining whether or not, in view of all the evidence, it can be said that the defendant is guilty beyond a reasonable doubt, you also consider the statements, if any, made by the defendants, that is the defendant Dehne, and the defendant corporation, because every statement that he made while acting as the manager of the defendant's store in Butte is its statement. And that binds his employer and it binds him. You have a right, also, to consider any statements made by the other clerks in the store, because they were agents acting in con-

nection with the boss, and their act is the act of their employer. That is with reference to the statements that are introduced in evidence here by the defendant himself, or by the defendants themselves. Where they produce this statement, they verify the contents, they admitted the truth of every statement contained in it, tho that statement be to their disadvantage.

Now, the court proceeds further and says, that if, after an impartial comparison and consideration of all of the evidence, you can truthfully say you are not satisfied of the [207] defendants' guilt, you have a reasonable doubt. In other words, if you are not satisfied of the guilt of the defendant, you have a reasonable doubt. If, on the other hand, after such an impartial comparison and consideration of all of the evidence, you can truthfully say that you have an abiding conviction, that is a fixed belief, of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. Or, we can state it in this way, that if, after an impartial view and consideration of all the facts and circumstances in the case, you have a continuing belief that the defendants are guilty of the charges made, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. In other words, if, after considering the case fairly and impartially

and measuring the proof by the rules that I shall give you, you can fairly say that if the matter or the question was one of weight or concern to you that you would be willing to act upon the truth of the charge, you must convict. If, on the other hand, the proof is such that you cannot say that you fairly believe that you would be willing to act upon the truth of the charge as made in a matter of real weight and concern to you, you should acquit.

In deciding the issue here, we must depend in part upon the words of men. Part of the record is in writing. Statements made by the defendant Dehne, and the clerk employed by him, and his employee, is in writing in part. This fixes itself definitely; there is no moving away from it. You give the words of that writing the attention that the average would give, but there is testimony here by word of mouth. It is generally said, and as a generality it is truly said, that the jury are the [208] exclusive judges of the weight and effect of testimony. Now, as a generality, that is true. However, the law requires that I shall charge you that while you are the judges of the weight and effect of evidence, and its value, you must consider the evidence, and weigh the testimony, not arbitrarily, that is, not as you would like to weigh the evidence or the testimony, but according to the rules of law as I shall give them to you. The first of these rules, as I have said before, is that the defendant, or defendants, and each of them is presumed to be innocent, and that you must acquit them unless that

presumption is overcome by evidence which satisfies your minds of their guilt of the charges made beyond a reasonable doubt. The statute requires that in hearing the testimony you shall weigh it and in appraising the witness, you shall appraise him in subordination to the rules of evidence as given by me. Among these rules is that you are not bound to decide in conformity with the declaration of any number of witnesses which do not produce conviction in your mind against a less number or against a presumption or other evidence satisfying your mind. Which simply means, stated otherwise, that you do not find according to the number but that you do find according to the effect that the testimony given has upon you. Another of these rules is that a witness false in one part of his testimony is to be distrusted in others. So, if, after considering the testimony of a witness, you feel in the light of all the circumstances he is false in one part of it, you have a right, and should distrust his testimony on all points.

You also should consider the fact that evidence is to be estimated not only by its own **intrinsic weight**, but also according to the evidence which it is in the power of one side [209] to produce, and of the other to contradict; and therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Another of the important rules by which you determine the weight and effect of evidence in deciding the case is the rule that the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case. There are only two cases known to the law in which the proof of one witness who is entitled to full credit will not justify conviction, and those cases are perjury and treason. Of course, this case does not fall within those limits, and the direct evidence of one witness who is entitled to full credit, is sufficient for proof of any fact in this case. You note I do not say that the testimony of one witness is sufficient for proof of any fact, but that the testimony of one witness who is entitled to full credit. Meaning that one witness whom you believe to be telling the truth is sufficient for proof of any fact here.

Now, there was some discussion during the argument, because of divergence of opinion on the part of counsel. One counsel contending that a statement made by a government witness had been denied by those testifying on the part of the defendant. During that discussion I stated, and I state to you now in the charge, that a witness can testify to facts only which he knows of his own knowledge, that is, which are derived from his own perception, and where a witness says "I don't remember" a certain thing; that "I don't remember having sold" a certain article to a certain person, or that "I don't recall having used" certain words, he does not tes-

tify to anything that is [210] his own personal knowledge, and his testimony has no bearing on the issue here and should not be considered by you. And it cannot be considered as contradicting a statement affirmatively made by another witness. In other words, if I should say under oath that there is a mouse in that corner of the room, it is fair to assume that the mouse is there; and if one of you say to me, "I don't see it", it does not prove that it is not there. If I told you that I saw a certain fire on the street corner in a certain day and of things that occurred, and you told me of someone who was there at the time and that he did not see it, that is no proof that my statement is not true. The fact that he did not see it does not mean it didn't happen. He may have overlooked it; he may not have been in a position to see it; and he may not be in a position to recall the occurrence. Ask yourself if it is not more probable that a man who goes in to a place of business to do a certain thing should recall what was said and done at the time he was intending to do that thing than the clerk waiting on him and who waited on four or five hundred customers a day, and busy at the moment; one man has his mind intently on a certain thing; the other is not dealing with a certain purpose, he has many purposes, and, as the witness said, they are extremely busy. Ask yourselves then, if it is not more reasonable to suppose that a man who says a thing happened should be believed rather than the man who says it didn't

if that man is engaged in many occupations at the moment and his attention is not pointed to the certain thing. On that point, the law is this, that when a person denies a recollection of having taken part in a certain conversation, tho it be under oath, it is not proof, and may not be taken as tending to prove, that the conversation did not take place. Also, if a witness goes upon a witness stand [211] and says "I do not recall having done a certain thing", it is not proof that he did not do these things. It is merely proof that he does not recall it, and having no recollection he cannot speak of his own personal knowledge, and such statements are not proof in a legal sense. At the outset, in determining whether or not a witness is entitled to full credit, we start with the presumption that the witness is telling the truth. The law simply adopts the rule that a witness is presumed to speak the truth. That again is your starting point. But, this presumption of truth-telling may be overcome in any one of a number of ways known to the law, but, unless the presumption of truth telling is overcome in one of those ways, it continues and the witness is entitled to full credit. Among the ways in which the presumption of truth telling may be repelled, as the law says, or overcome as the average man would say, is, first, by the character of the testimony. There are some things that are so impossible that no man can credit them. So, in determining whether a witness is entitled to full credit, you simply ask

is it reasonably probable, or is it reasonably possible, that things could have happened as he says they did. If you find that it is within reason that his statements may be true, then the presumption of truth telling is not overcome by the nature or character of the testimony. Another of the ways in which the presumption of truth-telling may be overcome is by the appearance of the witness on the stand. In determining whether the appearance of the witness while testifying is such as to overcome the presumption of truth-telling, you merely ask yourself this: "Was his appearance on the stand such that I would not deal with him in affairs of my own." You measure him just by the rule you would measure one with whom you were dealing in business. You know what the [212] indications of falsehood are as well as I: The shifty eye, the failure to meet your eye, failure to answer directly, and things of that kind, a failure to meet you half way. If you find that the demeanor or manner of a witness on the stand is such that you would not believe him to be telling the truth, if you were dealing with him then the presumption of truth-telling is overcome, as to that witness.

Another of the ways in which the presumption of truth-telling may be overcome is by motive, if any appear from the testimony, which impels the testimony of a witness. Motive is the well-spring of human conduct. It is rarely that we do anything except for the purpose of accomplishing some ob-

ject that we wish to accomplish. So you ask yourself whether there is anything appearing in the testimony here with reference to any witness, which would cause you as reasonable men to believe that he has a sufficient interest in the result of the case to cause him to take a chance on suffering the penalties of perjury for the purpose of accomplishing some object of interest to him. If you do find that the witness has some personal object to accomplish which is of sufficient importance to cause him to testify falsely, then you have a right to say that the presumption of truth telling as to that witness is overcome by the motive. In that connection, gentlemen, you have a right to ask yourself is it reasonably likely that a man employed as a government officer would deliberately go upon the witness stand and lie for the purpose of convicting a man whom he doesn't know, and in whom he has no interest. The question is whether there is any motive on the part of the government agents which would cause them to falsify merely to convict a man whom they know to be innocent.

Another of the ways in which it may be overcome is by contradictory evidence. However, under the law, there is no [213] contradiction here of any material statement made by the government witnesses; there is no contradiction on the sale of each and every article that was introduced in evidence; there is no contradiction that the sale was made by one of the clerks in the store of the defendant cor-

poration; there is no contradiction that those sales were made at the time and place specified in the indictment; but, as I say, there has been evidence of witnesses who say "I don't know", "I can't remember," "I don't recall", but that is not proof of anything, and it is no contradiction of a direct statement made by the witness who says "I do know". So there is no contradiction on that, and the contradiction of a detail, if there be any, is not of any importance. It must be a contradiction upon a vital matter. A question material to the issue and the decision of the guilt or innocence of the defendant here.

Now, Gentlemen, as I say, it would take too much time for me to attempt to analyze for you each of these twenty-two counts. As I have said: the first count is based upon the violation of one law, the next ten counts are based upon the violation of another law. Each of those ten counts are based upon the sale of denatured alcohol for beverage purposes. The next ten counts are each and all based upon a sale in an unstamped container; and the twenty-second and final count is based upon a supposed possession of the denatured alcohol with unlawful intent.

Reverting to the first count: the burden is upon the government to show that on or about March 9, 1939, or the early part of this year, at 34 North Main Street, Butte, Montana, the defendants did sell one or more of these exhibits under circumstances which would cause one reasonably to deduce

[214] that the article was sold, or was bought, for the purpose of being drank, or drunk. Now, that is the vital thing. It is not a question of whether the man who bought it did intend to drink it; it is not a question of whether he did or not intend to sell it to another. The question is, and the vital thing is, whether the circumstances existing at the time of the sale, were such as one would reasonably deduce that the man who bought the beverage or bought the article intended drinking it. If he did, and you are satisfied that those conditions existed in that way—As I say, it is not a question of what was done or as to the fact, if it be a fact, that the article was bought for the purpose of producing it in evidence here, and not for the purpose of being drank, or drunk, is not any ground for refusing to convict on the first count. Ask yourself there, did the defendants sell—they admit they sold some articles; they don't deny they sold these specified articles under such circumstances. The question is, with reference to the first count, was the article sold, the denatured alcohol, in one of the bottles, by the defendant to the witness Johnson. If it was sold, were the conditions then such, or the circumstances such that it might reasonably be deduced from them that it was the intention of Johnson to use the article that he got, if he got one, for beverage purposes. If the circumstances were such as to lead reasonably to that deduction, and that is shown to your satisfaction beyond a reasonable doubt, then it is your duty to convict on the first count.

With reference to the next ten counts, as I said, one to eleven, both inclusive, if the sale was made by the defendants of one of these bottles put in evidence, on March 9, or thereabouts, in 1939, to the witness Johnson, and the cir- [215] cumstances surrounding the sale were such that the defendants might reasonably have deduced that it was the intention of Johnson to procure the same for beverage purposes, the defendants are guilty upon count two.

Count three, count four, count five, all relate to sales said to have been made by the defendant Dehne, or one of the clerks in the establishment, of which he was manager, to the witness Johnson. If you find that there were four sales, that each of the sales were made under circumstances from which the defendant might reasonably have deduced that it was the intention of the purchaser Johnson to procure the denatured alcohol for beverage purposes, then you should convict on counts two, three, four and five. Those are the four purchases said to have been made on March 9th. Then, we find that there are other purchases said to have been made on March 10th, four of them. Those are set out in counts six, seven, eight and nine. And it is again for you to decide, first, were the sales made on or about March 10th, by the defendant, acting thru its manager, the defendant Dehne, or one of the other clerks, at its establishment in Butte, Montana, to the witness Johnson. If you find that the sales were made and that the conditions or the cir-

cumstances then existing were such that the defendant, that is Dehne, might reasonably have deduced that it was the intention of the purchaser, Johnson, to procure the same for use for beverage purposes, then you should convict on each of those four counts. Six, seven, eight and nine, all based on transactions said to have been had on March 10th of this year.

With reference to counts ten and eleven, the indictment charges the offense set out in each of them occurred on the same day, April 15, 1939; each of them involving a supposed sale [216] of denatured alcohol. And if you find from the evidence beyond a reasonable doubt that these sales were made by one of the clerks employed in the establishment of the defendant corporation, in Butte, Montana, on or about that date, and that the conditions were then such that the person making the sale might reasonably have deduced from them that it was the intention of the purchaser to procure the article bought, denatured alcohol, for use for beverage purposes, then you should convict on counts ten and eleven.

With reference to counts twelve to twenty-one, both inclusive, they cover the same ground that is covered by counts two to eleven, both inclusive, the only difference in the charge is that the containers in which the denatured alcohol was at the time of its sale, did not have any government revenue stamps upon it as required by law. I take it

that no one will question it when I say that if the defendants here are guilty on counts two, to eleven, they are also guilty on counts twelve to twenty-one. The same elements must exist in twelve to twenty-one that exist in counts two to eleven; there must have been a sale by some one employed in the store of the defendant corporation, at Butte, Montana, on or about the date specified, of denatured alcohol to the witness Johnson; the circumstances then existing must have been such that the person making the sale might reasonably have deduced that it was the intention of the purchaser, Johnson, to procure the articles, the denatured alcohol, for use for beverage purposes; and in addition to that, in order that a conviction may be had upon counts twelve to twenty-one, it must have been shown that the containers of the articles sold under those circumstances did not have the revenue stamp on it. Now, it is fair to say, gentlemen, if the [217] defendants, are guilty of these other counts in making the sales under these conditions, it is also fair to say that you should convict upon count twenty-two. The charge is merely that the defendants did possess a quantity of denatured alcohol, intended for sale under circumstances in which the person making the sale, that is the clerk in the store of the defendant, corporation, or one of them, might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes.

Now, the question of whether the circumstances

surrounding these transactions are such as to cause you, as reasonable men, to be satisfied beyond a reasonable doubt that the sales were made under circumstances which would reasonably cause one to believe that the buyer intended to use the articles for beverage purposes is entirely for you; to be determined on the evidence as it appears to you.

In conclusion, the indictment is not proof of anything, and must not be considered by you as proof of any count or element contained in it. The fact that the defendants are here on trial, charged with a Federal offense, must not be considered by you as proof, or tending to prove that they, or either of them, is guilty of any of the offenses charged. At the outset of the trial the defendant is presumed to be innocent. This presumption is binding upon you, and you must find the defendant not guilty unless and until this presumption is overcome by proof which satisfies your mind of the guilt of the defendants beyond a reasonable doubt. When you retire to your jury room, you will select one of your number foreman. That one will sign whatever verdict you return here. Twelve of your number are necessary to agree upon any verdict. Three forms of [218] verdict will be submitted to you. One of these forms is we the jury in the above entitled case finds the defendants guilty in manner and form as charged in the indictment. Which means that you are satisfied beyond a reasonable doubt that the

defendants are guilty of each offense charged in the indictment. That is a conviction on each of the twenty-two counts.

Another of the forms is we the jury in the above entitled action find the defendants not guilty. That means that you have determined, after considering all the facts in the case, that the government has not proven that the defendants are guilty upon any charge made. That covers the entire case and is an acquittal on each and all of the counts.

Another form which will be given you is, we the jury in the above entitled case find the defendants guilty in manner and form as charged in the indictment on file herein as to counts, then you have it blank, and not guilty as to counts, and then a blank. In other words, as I have told you in the beginning, you have a right to set down the conditions as you find them, and find the defendants guilty on one count and not guilty on others. If you find that the defendants are guilty as charged in some counts of the indictment, you merely fill in the number of the counts on which you believe they are guilty, and if you find that it is not proven beyond a reasonable doubt that they are guilty on other counts, why you insert after the words "not guilty as to counts" whatever they may be. In other words, that is a split verdict. If you find them guilty on some counts and not guilty on others. If you find them guilty, if you do, on all

counts, you merely return your verdict, "We, the jury find the defendants guilty in manner and form as charged." If you find the government's case is not proven as to any count, you [219] return the verdict "Not guilty". If you find the case is proven as to some counts and not as to others, you indicate by your verdict on which one you believe the government has sustained its case and insert in the last blank the number of the counts on which you feel that the government has failed to prove its case.

I note that there is a verdict here which would justify the jury in finding one of the defendants guilty without the other. As I said, the offense is based entirely on the act of Dehne.

Mr. Brown: That is right.

The Court: And as I view it, they either convict both or acquit both on the counts as they are written.

Has the government any objection or exception to the charge as given?

Mr. Brown: No.

The Court: Have the defendants, or either of them any objection or exception to the charge as given?

Mr. Corette: No, your Honor.

(Whereupon the jury retired in charge of a bailiff to consider of their verdict.) [220]

Subsequently at about 10:20 p.m. on November 15th, 1939, the jury returned into Court with their verdict, which is as follows:

[Title of Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein.

E. H. YOUNG

Foreman

[Endorsed]: Filed November 15, 1939.

That thereafter on the 20th day of November, 1939, judgment was rendered and pronounced by the Court by order duly and regularly signed, made and entered as follows:

[Title of Court and Cause.]

JUDGMENT

By an indictment, containing twenty-two counts, duly found and presented by a grand jury and filed herein on June 17, 1939, it is charged: [221]

[Note: Counts One to Twenty-two are already set forth in the Indictment (pages 2 to 29 of this printed record), so are here omitted to avoid duplication.]

On October 18, 1939, the defendants herein were called before the Court at the courtroom thereof in the City of Butte, in the State and District of Montana, for arraignment and plea, and then and there, and at his request, the name of Robert D. Corette, an attorney and counsellor at law admitted to practice at the bar of the above-entitled court, was entered of record as counsel for the parties defendant herein and each of them; thereupon said indictment was read to the defendant Edgar Dehne, in person, and to said Robert D. Corette as counsel for the United Cigar Whelan Stores Corporation, a corporation; the defendant Edgar Dehne, in person, answered that his true name is Edgar Dehne and pleaded that he is not guilty of the offenses charged, and the defendant United Cigar Whelan Stores Corporation, a corporation, speaking through its said counsel, answered that its true name is United Cigar Whelan Stores Corporation, a corporation, and pleaded that it is not guilty of the offenses charged; whereupon the Court stated that the case would be set for trial and tried at the next jury term of the court to be held at the City of Butte, in the State and District of Montana.

Thereafter the case was set for trial before the above-entitled Court at the courtroom thereof in the City of Butte, in the State and District of Montana, at the hour of Ten (10) o'clock in the morning on November 14, 1939.

At the hour of Ten (10) o'clock in the morning on November 14, 1939, the above-entitled case came duly and regularly on for trial before the above-entitled Court, at the courtroom thereof in the City of Butte, in the State and District of Montana. The United States of America was represented by the Honorable R. Lewis Brown, Assistant to the Attorney of the United States of America for the District of Montana, and the defendant Edgar Dehne was present in court in person and represented by Robert D. Corette, Esq., his attorney, and the defendant United [243] Cigar Whelan Stores Corporation, a corporation, was represented by Robert D. Corette, Esq., its attorney. Both of the defendants were also represented by Wm. A. Davenport, Esq., whose name was entered as associate counsel. A jury of twelve qualified men was duly empaneled and sworn to try the case; testimony was introduced on the part of the parties plaintiff and defendant, and the case not being concluded at the time set for adjournment further hearing of the case was continued until ten (10) o'clock in the morning on November 15, 1939, at the court room of the above-entitled court in the City of Butte, in the State and District of Montana. At the hour of Ten (10) o'clock in the morning on November 15, 1939, the trial of the case was resumed, and further testimony on the part of the parties plaintiff and defendant was introduced; whereupon, the parties plaintiff and defendant having rested, the case

was argued to the jury by the attorneys for the plaintiff and defendants, and thereupon, and at the conclusion of the arguments, the Court charged the jury as to the law of the case, and at the conclusion of the charge the jury retired for deliberation, in charge of officers duly sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself unless by order of the Court or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed or when ordered by the Court.

Thereafter, and on November 15, 1939, the jury having agreed upon a verdict, they were conducted into court by the officers having them in charge, and there, in the presence of the defendant Edgar Dehne and his counsel and counsel for the defendant United Cigar Whelan Stores Corporation, a corporation, who were then, and at all times during the trial of the case had been, present in court, their names were called by the Clerk, and all being present their foreman delivered their verdict, which, omitting the title [244] of court and cause, is in words and figures as follows, to-wit:

“We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein.”

to the Court, the Court delivered the verdict to the Clerk, who filed the same and then read the same to the jury and asked them if the verdict as

recorded is their verdict, and all of the jury assenting thereto they were discharged, and the Court appointed the hour of Ten (10) o'clock in the morning on November 20, 1939, at the courtroom of the above-entitled court in Butte, Montana, as the time and place for pronouncing judgment.

At the hour of Ten (10) o'clock in the morning on November 20, 1939, the defendant Edgar Dehne appeared personally in court, with his counsel, for judgment, and the defendant United Cigar Whelan Stores Corporation, a corporation, was represented by Robert D. Corette, Esq., its attorney, and defendants were informed by the Court of the nature of the charges against them and of their pleas and the verdict thereon, and they were asked by the Court whether they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being alleged or appearing to the Court why judgment should not be pronounced,

It is ordered and adjudged, and this does order and adjudge:

1: That for the offense set out in Count One of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a fine of Twenty-five Hundred (\$2500.00) Dollars to the United States of America;

2: That for the offense set out in Count One of the indictment herein the defendant Edgar Dehne shall pay a fine of One Hundred (\$100.00) Dollars

to the United States of America, without imprisonment for non-payment of said fine, and shall be committed to the custody of the Attorney General of the United States, or [245] his authorized representative, for confinement in a jail for the term of Thirty (30) Days:

(Secs. 3250(b)(1), 3254(c), 3253, I.R.C.)

3: That for the offense set out in Count Two of the Indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

4: That for the offense set out in Count Two of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

5: That for the offense set out in Count Three of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

6: That for the offense set out in Count Three of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

7: That for the offense set out in Count Four of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

8: That for the offense set out in Count Four of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

9: That for the offense set out in Count Five of the indictment herein the defendant United Cigar Whelan Stores Corporation, [246] a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

10: That for the offense set out in Count Five of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

11: That for the offense set out in Count Six of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

12: That for the offense set out in Count Six of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

13: That for the offense set out in Count Seven of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

14: That for the offense set out in Count Seven of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

15: That for the offense set out in Count Eight of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

16: That for the offense set out in Count Eight of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America; [247]

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

17: That for the offense set out in count Nine of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

18: That for the offense set out in Count Nine of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

19: That for the offense set out in Count Ten of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

20: That for the offense set out in Count Ten of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253;

21: That for the offense set out in Count Eleven of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

22: That for the offense set out in Count Eleven of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

23: That for the offense set out in Count Twelve of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred [248] (\$200.00) Dollars to the United States of America;

24: That for the offense set out in Count Twelve of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3109, 3111, 3115, I.R.C. and A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

25: That for the offense set out in Count Thirteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

26: That for the offense set out in Count Thirteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

27: That for the offense set out in Count Fourteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

28: That for the offense set out in Count Fourteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

29: That for the offense set out in Count Fifteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

30: That for the offense set out in Count Fifteen of the indictment herein the defendant Edgar Dehne shall pay a [249] penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

31: That for the offense set out in Count Sixteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

32: That for the offense set out in Count Sixteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

33: That for the offense set out in Count Seventeen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

34: That for the offense set out in Count Seventeen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

35: That for the offense set out in Count Eighteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

36: That for the offense set out in Count Eighteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253) [250]

37: That for the offense set out in Count Nineteen of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

38: That for the offense set out in Count Nineteen of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

39: That for the offense set out in Count Twenty of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

40: That for the offense set out in Count Twenty of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a), 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253)

41: That for the offense set out in Count Twenty-one of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of Two Hundred (\$200.00) Dollars to the United States of America;

42: That for the offense set out in Count Twen-

ty-one of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 2800(a), 2802, 2803(a). 3111, 3112, 3115, I.R.C.; A. 146, Reg. No. 3, as amended; Fed. Reg. 1937, Vol. 2, Part I, page 1253) [251]

43: That for the offense set out in Count Twenty-two of the indictment herein the defendant United Cigar Whelan Stores Corporation, a corporation, shall pay a penalty of One Thousand (\$1,000.00) Dollars to the United States of America; and,

44: That for the offense set out in Count Twenty-two of the indictment herein the defendant Edgar Dehne shall pay a penalty of One (\$1.00) Dollar to the United States of America;

(Secs. 3116, 3111, 3115(a), I.R.C.; A. 146, Reg. No. 3, as amended).

It is further ordered and adjudged, and this does further order and adjudge:

1: That the Clerk of this Court deliver a certified copy of this judgment and committment to the United States Marshal, or other qualified officer, and that the same shall serve as the committment herein; and,

2: That this Judgment, and each and every part and portion of it, so far as the fines and penalties fixed therein, and each and all of them, are concerned, may be enforced by execution against the

property of the defendant liable for said fines and penalties in like manner as judgments in civil cases are enforced. (R. S. Sec. 1041; Sec. 569 T. 18 U.S.C.A.)

Done in open court at Butte, Montana, this 20th day of November, 1939.

JAMES H. BALDWIN

United States District Judge,
District of Montana.

[Endorsed]: Filed and entered November 20th, 1939. C. R. Garlow, Clerk. [252]

That thereafter, on the 20th day of November, 1939, the defendant, Edgar Dehne served and filed his Notice of Appeal.

That thereafter, on the 21st day of November, 1939, the defendant, United Cigar Whelan Stores Corporation, a corporation, served and filed its Notice of Appeal.

That thereafter, the court directed the United States Attorney and the attorneys for the appellants and defendants to appear before him at 1:30 o'clock p.m. on the 21st day of November, 1939, and at said time made the following

ORDER:

[Title of Court and Cause.]

Counsel for the respective parties were present in court at 1:30 o'clock P.M. this day for

receiving such directions as may be appropriate with respect to the preparation of the record on appeal herein.

Mr. R. Lewis Brown, Assistant District Attorney, was present and appeared for the United States, and Mr. Robert D. Corette and Mr. William A. Davenport were present and appeared for the defendants and appellants. The defendant Edgar Dehne was not personally present.

Thereupon, it appearing to the court that the appeal herein is to be prosecuted with a bill of exceptions, court ordered that within thirty days from this date the appellants shall procure to be settled and shall file with the clerk of this court a bill of exceptions setting forth the proceedings upon which the appellants wish to rely, in addition to those shown by the clerk's record of proceedings as described in Rule VIII; that within the same time the appellants shall file with the clerk of this court an assignment of [253] the errors of which appellants complain; and that upon the filing of the bill of exceptions and assignment of errors the clerk of this court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Entered November 21, 1939.

And now, within the time allowed by law, and as granted by the Court, the defendants present this, their proposed Bill of Exceptions, of all the proceedings had at the trial of the above entitled action and ask that the same may be signed, settled and allowed as true and correct.

Dated this 28th day of November, 1939.

CORETTE & CORETTE

ROBERT D. CORETTE and

WM. A. DAVENPORT

Attorneys for Defendants
and Appellants.

Service of the foregoing proposed Bill of Exceptions is admitted and copy thereof received this 28th day of November, 1939.

R. LEWIS BROWN

Assistant United States District
Attorney for the District of
Montana. [254]

United States of America
State of Montana
County of Silver Bow—ss.

I, James H. Baldwin, Judge of the District Court of the United States for the District of Montana, who presided at the trial of the foregoing action, do hereby certify: That said bill of exceptions is full, true and correct and contains all of the testimony and evidence offered and received upon said

trial and all of the testimony and evidence offered by the parties and excluded by the court, and all exceptions taken upon said trial, and all rulings by the court thereon and during said trial, and all instructions given by the court to the jury, and that there is incorporated in said bill of exceptions all rulings and orders made by the court and all exceptions thereto and all proceedings had in the cause against either of the parties, together with the objections and exceptions thereto made and reserved with all matters and proceedings had on the said trial, and the same is hereby settled and by me settled and signed and allowed as true, full and correct at the date herein.

Done and dated this 19 day of December, A. D. 1939.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Lodged November 28, 1939. Filed December 19, 1939. [255]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal herein from the verdict of the above entitled

Court, entered in the above entitled Court and cause on the 15th day of November, 1939, and from the judgment of the above entitled Court entered and pronounced in the above entitled Court and cause on the 20th day of November, 1939, and say that said verdict and judgment are erroneous and unjust to these defendants because:

I.

The Court erred in denying and overruling the motion of the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, objecting to the introduction of any evidence and asking for a dismissal of the indictment, which said motion and objection was made upon the following grounds and for the following reasons: First, that the indictment does not state facts sufficient to constitute an offense or offenses against the laws of the United States; second, that the facts set forth in counts one to twenty-two inclusive of the [256] indictment, do not state facts sufficient to constitute any offense against the laws of the United States; third, that counts number one, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one charge the defendants with offenses committed against the Revenue Laws of the United States between the dates of March 9, 1939 and April 15, 1939; that prior to that time, and on February 10, 1939, the Internal Revenue Code was re-enacted and the old Internal Revenue Code was repealed;

that the sections under which the indictments are brought in these counts which I have specified were brought under the old law which was repealed on February 10, 1939; the acts set forth in the indictment having occurred in March and April of 1939, therefore, at the time of the indictment, and as to these specified counts there was no law under which the indictment could be brought.

And for a further ground, these defendants object to the introduction of any evidence and ask for a dismissal of the indictments upon the grounds and for the reasons that regulation 4750, upon which all of the counts numbered one to twenty-two inclusive, and the entire indictment is based—that is Treasury Decision 4750—is in denial of due process of law, is unconstitutional and void.

II.

The Court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the Government's case, which motion was made upon the following grounds and for the following reasons:

First, that the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of [257] the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp

and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The evidence is insufficient in the following particulars: [258] The Government failed to show that the defendant Edgar Dehne had any proprietary interest in the business of the United Cigar Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 p.m. and 5:25 p.m. on March 9th, and 10:20 a.m. and 7 p.m. on March 10th, 1939. Therefore, the evidence

will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it [259] as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

III.

The Court erred in admitting evidence concerning the sale of rubbing alcohol by persons other

than the defendant Dehne. The substance of such testimony given by Government witness Julius Johnson is in words and figures as follows: I was next in the store at 7:25 the same evening (March 9, 1939) dressed in the same clothes and at that time Cyril Varco was the name of the fellow that is clerking, was in there in charge. The question was then put: "What, if anything, did you say to that person?", at which time the following objection was made: "We object to the introduction of any evidence concerning any other person than Mr. Dehne, who is the person indicted in this complaint. The indictment reads 'to the defendants' throughout, which would mean Edgar Dehne and the United Cigar Store."

"The Court: Overruled."

"Mr. Corette: Exception."

"The Court: Exception noted."

"Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter."

"A. I walked up to the counter and I said: 'Give me a box [260] of snuff.' He gave me the package and I paid him ten cents, and I said: 'Give me a bottle of alcohol too, will you?' And he wrapped up a bottle of rubbing alcohol and hands it to me and I walked out."

IV.

That the Court erred in admitting the following portion of the testimony of Government witness Roy H. Beadle:

“Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any, have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol?”

“Mr. Corette: To which we object on the ground and for the reason it does not tend to prove any issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases.”

“The Court: Overruled.”

“Mr. Corette: Exception, please.”

“The Court: Exception noted.”

“Q. What have you observed, tell us.”

“A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehornes and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner.”

“Q. And have you noticed them coming out of the store?”

“A. Yes, I have.”

“Mr. Corette: The same objection, your Honor, to this entire line of testimony.”

“The Court: Very well, the objection will be noted to each question.”

“Mr. Corette: And exception.” [261]

V.

That the Court erred in admitting the following portion of the testimony of defense witness Cyril Varcoe elicited upon cross examination:

“Q. Now, Mr. Varcoe, if a man came in to you, bought a pint of rubbing alcohol from you, and an hour after that the same man came back and bought another pint from you, and that another hour after that the same man came back and bought another pint from you, would you consider that man was using that for a legitimate purpose and make the sale to him?”

“Mr. Corette: The question assumes facts not in evidence; assumes three purchases from the same clerk; no evidence being introduced as to three purchases from the same clerk, and therefore, incompetent, irrelevant and immaterial.”

“The Court: Overruled.”

“Mr. Corette: Exception, please.”

“The Court: The exception will be noted.”

“Q. Do you have the question in mind?”

(Question read)

“A. Yes sir. I would. I bought six myself in one afternoon, and I could see how that would be all right. If the gentleman came in each time sober and without anything smelling on his breath.”

VI.

The court erred in denying and overruling the motion of defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for

the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

First, that the indictment does not state facts sufficient to constitute an offense against the laws of the United States. [262]

Second, that each count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing [263] alcohol.

The evidence is insufficient in the following particulars: The Government failed to show that the defendant Edgar Dehne had any proprietary interest in the business of the United Cigar Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and

wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 p.m. and 5:25 p.m. on March 9th, and 10:20 a.m. and 7 p.m. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who [264] purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quan-

tity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

The *the* evidence produced by the defendants proved that the defendants discriminated in an effort to at all times comply with the law in making their sales of rubbing alcohol whenever it appeared to the defendants that there was reason to suspect it was the intention of the purchaser to use the same for beverage purposes.

Wherefore, defendants, United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, pray that the said verdict and judgment of the District Court of the United States, for the District of Montana, may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated this 28th day of November, 1939.

CORETTE & CORETTE

ROBERT D. CORETTE

WM. A. DAVENPORT

Attorneys for Defendants and
Appellants,

United Cigar Whelan Stores
Corporation, a corporation,
and Edgar Dehne.

CORETTE & CORETTE,

ROBERT D. CORETTE and

WM. A. DAVENPORT

619-621 Hennessy Bldg.

Butte, Montana. [265]

Service of the foregoing Assignment of Errors is admitted and copy thereof received this 28th day of November, 1939.

R. LEWIS BROWN

Assistant United States
District Attorney.

[Endorsed]: Filed November 28, 1939. [266]

[Endorsed]: No. 9397. United States Circuit Court of Appeals for the Ninth Circuit. United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne, Appellants, vs. The United States of America, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Montana.

Filed December 29, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 9397

UNITED CIGAR-WHELAN STORES CORPO-
RATION, a corporation, and
EDGAR DEHNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
TO BE PRINTED

The appellants in the above entitled action here-
by adopt as the points on which they intend to rely
on appeal, the original Assignment of Errors filed
in the above entitled action.

The appellants in the above entitled action here-
by designate as the record to be printed in the above
entitled action, the entire transcript heretofore filed
with the clerk of the above entitled court.

Dated: January 8, 1940.

JESSE H. STEINHART

JOHN J. GOLDBERG

Attorneys for Appellants.

[Endorsed]: Filed Jan. 9, 1940. Paul P. O'Brien,
Clerk. [268]